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N. 2930

No. 14693

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**United States**  
**Court of Appeals**  
for the Ninth Circuit

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MAY W. BENTLEY, RAYMOND L. RUSNAK  
and JOSEPH HOMAN,

Appellants,

VS.

ROSEBUD COUNTY, MONTANA,

Appellee.

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**Transcript of Record**

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**Appeal from the United States District Court for the  
District of Montana, Billings Division**

**FILED**

**MAY -2 1955**



No. 14693

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**United States  
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF ATTORNEYS

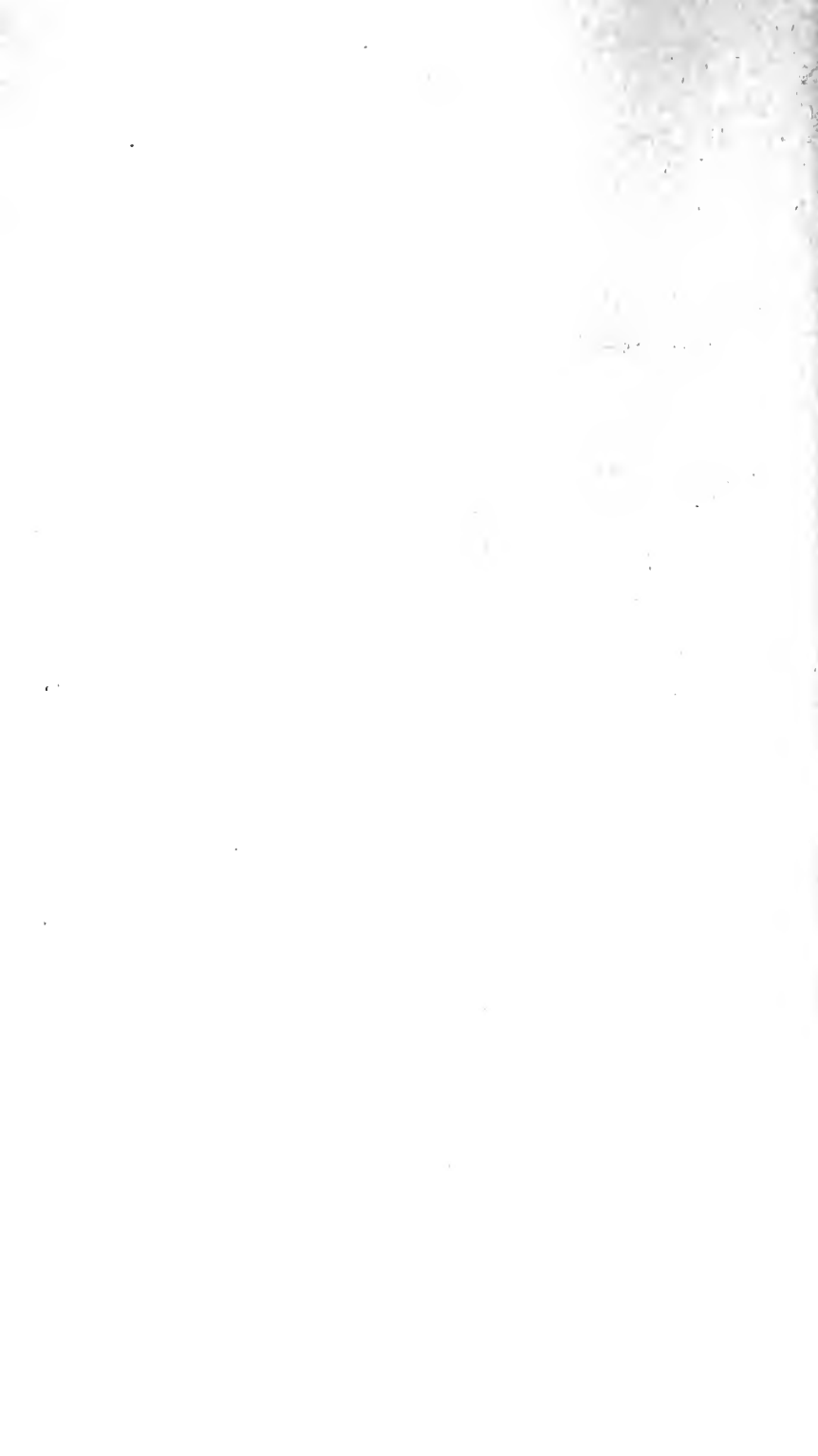
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Attorneys for Defendant Rosebud County,  
Montana, and Appellee.



In the District Court of the United States for the  
District of Montana, Billings Division

Civil No. 1460

MAY W. BENTLEY, RAYMOND L. RUSNAK,  
and JOSEPH HOMAN,

Plaintiffs,

vs.

ROSEBUD COUNTY, MONTANA, a Body Cor-  
porate; ROY M. KING, Sometimes ROY  
KING, and CELIA I. KING, His Wife, and  
EDWARD L. GREBE, Sometimes E. L.  
GREBE, and CAROLINE GREBE, His Wife,

Defendants.

## COMPLAINT

The plaintiffs complain of the defendants as fol-  
lows:

### I.

The plaintiff, May W. Bentley, now at the com-  
mencement of this action is, and long heretofore has  
been, a citizen and resident of the state of Oregon.

### II.

The plaintiffs, Raymond L. Rusnak and Joseph  
Homan, now at the commencement of this action are,  
and long heretofore have been, citizens and resi-  
dents of the State of Illinois.

### III.

The defendant, Rosebud County, Montana, now  
at the commencement of this action is, and at all

times herein has been, a citizen and resident of the State of Montana, viz., a body corporate under the laws of the State of Montana with its county seat at Forsyth, Montana, within the territorial boundaries of the said county.

#### IV.

The defendants, Roy M. King, sometimes Roy King, and Celia I. King, his wife; Edward L. Grebe, sometimes E. L. Grebe, and Caroline Grebe, his wife, now at the commencement of this action are, and at all times herein have been, citizens and residents of the State of Montana.

#### V.

This is a civil action in which the matter in controversy is the title to the lands and real estate hereinafter more particularly described together with the appurtenances thereto and the rents, issues and profits therefrom, which is of the value of \$75,000.00 and more.

#### VI.

This Court therefore has jurisdiction of this civil action and in the premises, because herein the matter in controversy exceeds the sum or value of \$3,000.00, exclusive of interest and costs, and is wholly between citizens of different states, viz., between citizens of the states of Oregon and Illinois as plaintiffs, and citizens of the State of Montana as defendants.

#### VII.

The plaintiffs now are, and at the times herein have been, the owners in fee simple absolute of the

following described lands and parcels of real estate lying and being in Rosebud County, Montana, to wit:

All of Section Fifteen (15) in Township Eleven (11) North, of Range Thirty-two (32) East, Montana Principal Meridian, Montana; together with all and singular the tenements, hereditaments and appurtenances thereto and the rents, issues and profits therefrom,

and therefore claim title as aforesaid to the said real estate.

### VIII.

The defendants, Rosebud County, Montana, a body corporate; Roy M. King, sometimes Roy King, and Celia I. King, his wife, and Edward L. Grebe, sometimes E. L. Grebe, and Caroline Grebe, his wife, one and all claim some right, title, estate or interest in or to the real estate herein described, or in or to some part or parcel thereof, viz., adverse to the plaintiffs' ownership. But the claims of the defendants as aforesaid, and of each such defendant, are wholly unfounded and without right; and the said defendants one, each and all have no right, title, estate or interest in or to the said real estate, or in or to any part or parcel thereof.

Wherefore the plaintiffs pray that the claims of the said defendants, and of each of them, to the real estate herein described and in the premises may be determined, that the title in fee to the said real estate be quieted in the plaintiffs against the claims of the said defendants, and of each of them,

that the plaintiffs be adjudged to be the owners of the said real estate in fee simple absolute, and of all right, title, estate and interest therein or thereto as against the said defendants, and each of them; and that they may have all other and further relief as may be meet and agreeable to equity.

/s/ ARTHUR R. MEYER,  
Attorney for Plaintiff.

/s/ HORACE S. DAVIS,  
BROWN, DAVIS & SANDE,  
BEN N. FORBES,  
ROCKWOOD BROWN, JR.,

By /s/ HORACE S. DAVIS,  
Attorneys for Plaintiffs.

[Endorsed]: Filed December 30, 1952.

---

[Title of District Court and Cause.]

ANSWER OF THE DEFENDANT  
ROSEBUD COUNTY, MONTANA

I.

Defendant admits the allegations contained in paragraphs III and IV of the complaint; denies each and every allegation in paragraph VII of the complaint; admits that it claims some right, title, estate or interest in or to the real estate herein described, adverse to plaintiffs' claim as alleged in paragraph VIII of the complaint herein, but denies that its claim is wholly unfounded and without right



and that it has no right, title, estate or interest in or to the said real estate or in any part or parcel thereof; alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs I, II, V and VI of the complaint, and denies each and every other allegation contained in the complaint, not herein specifically admitted or denied;

## II.

As a further and separate and affirmative defense, this answering defendant alleges:

### 1.

That the defendant did on January 15, 1943, duly and regularly and in full compliance with the laws of the State of Montana made and provided in such case, by and through its duly elected and qualified Clerk and Recorder, obtain from the duly elected and qualified Treasurer of Rosebud County, a tax deed to those certain lands described and set out in plaintiffs' complaint herein, more particularly described as follows, to wit:

All of Section Fifteen (15), in Township Eleven (11) North, of Range Thirty-two (32) East, M.P.M.

### 2.

That said tax deed was duly filed of record in the office of the County Clerk and Recorder on January 18, 1943, at 4:00 o'clock p.m., and duly recorded in Book 39 of Deeds, Page 334, Records of Rosebud County, Montana.

## 3.

Under and by virtue of said tax deed this defendant did, upon January 15, 1943, become the sole owner in fee simple absolute of the above-described premises, more particularly described as follows, to wit: All of Section 15, in Township 11 North, of Range 32 East, M.P.M., Rosebud County, Montana, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof;

## 4.

That thereafter and upon the 15th day of May, 1947, this defendant duly and regularly sold and conveyed by quit claim deed all of the above-described premises to Roy M. King and E. L. Grebe, some of the defendants herein named in plaintiffs' complaint, excepting and reserving unto Rosebud County, Montana, its successors and assigns, a royalty interest of  $6\frac{1}{4}\%$  of all oil, gas and minerals recovered and saved from the lands above described; said deed was duly filed of record in the office of the County Clerk and Recorder on May 26, 1947, at 11:00 o'clock a.m., and duly recorded in Book 47 of Deeds, Page 155, Records of Rosebud County, Montana;

## 5.

That under and by virtue of the above-described tax deed and the reservations and exceptions contained in the herein-described quit claim deed, this answering defendant alleges that it is the sole owner

of a royalty interest of  $6\frac{1}{4}\%$  of all oil, gas and minerals recovered and saved from the lands above described.

### III.

As a further and separate and affirmative defense, this answering defendant alleges:

#### 1.

That the cause of action stated in the complaint herein is barred by the provisions of Sections 2214, 2214.1 and 2214.2 of the Revised Codes of Montana of 1935, and Section 84-4160.1 of the Revised Codes of Montana of 1947.

### IV.

As a further and separate and affirmative defense, this answering defendant alleges:

#### 1.

That upon the 31st day of August, 1948, in the District Court of the Sixteenth Judicial District of the State of Montana, in and for the County of Rosebud, the same being a Court of general jurisdiction, a judgment was duly given and made in Civil cause No. 5475, wherein Roy M. King, one of the defendants named in plaintiffs' complaint herein, was plaintiff, and May W. Bentley, her heirs, successors and assigns, among others, and the unknown owners of the real property in the complaint herein described, and all other persons unknown, claiming or who might claim any right, title, estate or interest in, or lien or encumbrance upon the real property described in the complaint, or any thereof, adverse to

plaintiffs' ownership, or any cloud upon plaintiffs' title thereto, whether such claim or possible claim be present or contingent, including any claim or possible claim of dower, inchoate or accrued, were defendants, adjudging and decreeing the said Roy M. King to be the owner in fee simple of the lands and premises described as Section 15, in Township 11 North, of Range 32 East, M.P.M., said judgment being duly docketed August 31, 1948, at 2:00 o'clock p.m., and thereafter duly filed in the office of the County Clerk and Recorder on September 3, 1948, at 3:00 o'clock p.m., and duly recorded in Book 4 of Orders and Decrees, Page 487, Records of Rosebud County, Montana;

2.

That the plaintiffs contained in the plaintiffs' complaint in the above-entitled action, Raymond L. Rusnak and Joseph Homan, were unknown as claimants to any right, title, or interest in and to the above-described lands at the time of the above set out judgment and would, therefore, be included as defendants in the above-designated action and judgment as the unknown owners of the real property in the complaint herein described; that no appeal has been taken from said judgment and time for appeal or motion to set aside default judgment has long since passed.

3.

That by reason of said judgment, as aforesaid, these plaintiffs, and each of them, are estopped, barred and forever foreclosed from asserting any

claim, right, title or interest whatsoever in and to said premises.

V.

As a further and separate and affirmative defense, this answering defendant alleges:

1.

That at all times subsequent to the 18th day of July, 1939, the plaintiff May W. Bentley, knew, or in the exercise of reasonable care for the preservation of her property interests should have known, of the potential value of all of Section 15, in Township 11 North, of Range 32 East, M.P.M., for oil and gas; that her failure to pay taxes and assessments would subject said land to forfeiture to the County of Rosebud; that by reason of her failure to pay taxes from and after the year 1935, said land would be and has been forfeited to the County of Rosebud; that the plaintiff May W. Bentley knew, or in the exercise of reasonable care for the preservation of her own rights should have known, that because of her failure to pay taxes from and after the year 1935 the County of Rosebud would acquire tax deed to said lands; that in a consequence of such delinquency and neglect by the said plaintiff, the County of Rosebud did acquire a tax deed from the County Treasurer of Rosebud County on January 15, 1943; that thereafter the County of Rosebud did convey and quit claim said premises on May 15, 1947, to Roy M. King and E. L. Grebe; that the said Roy M.

King and E. L. Grebe have been in the exclusive, open, notorious, visible and continuous adverse possession of said property since that time and have paid all taxes and assessments legally levied and assessed upon said lands; that notwithstanding her knowledge of the potential value of said lands for oil and gas, and notwithstanding her known obligation for payment of taxes and her delinquency in payment and her knowledge that the lands would be and have been forfeited for such failure, plaintiff May W. Bentley abandoned said lands for upwards of 18 years and negligently slept on her rights, if any, and failed to assert any claim thereto until the present time when such lands have recently become valuable for oil and gas development; that in justice and equity plaintiff is barred by laches from now asserting any interest or rights in said property.

Wherefore, this answering defendant prays that plaintiffs take nothing by reason of their complaint, and this answering defendant be adjudged to be the sole owner of a royalty interest of  $6\frac{1}{4}\%$  of all oil, gas and minerals recovered and saved from said lands above described, and for such other and further relief as may to this Court seem meet, just and equitable in the premises.

Dated this 22nd day of January, 1953.

RUSSELL K. FILLNER,  
County Attorney, Forsyth,  
Montana;

H. G. YOUNG,  
Special Counsel,  
Forsyth, Montana;

By /s/ RUSSELL K. FILLNER,  
Attorneys for Defendant.

Service of Copy acknowledged.

[Endorsed]: Filed January 23, 1953.

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[Title of District Court and Cause.]

AMENDED ANSWER OF THE DEFENDANTS,  
ROY M. KING, SOMETIMES ROY KING,  
AND CELIA I. KING, HIS WIFE, AND  
EDWARD L. GREBE, SOMETIMES E. L.  
GREBE, AND CAROLINE GREBE, HIS  
WIFE

\* \* \*

VI.

That in the month of October, 1947, the defendants, Roy M. King and his wife, Celia I. King, and E. L. Grebe and his wife, Caroline Grebe, made, executed and delivered to The Texas Company Oil and Gas Leases covering the hereinabove described property, granting to The Texas Company the exclusive right to develop and operate the said premises for oil and gas purposes, and warranting to the said The Texas Company that the Lessors, Roy M. King and his wife, Celia I. King, and E. L. Grebe and his wife, Caroline Grebe, were the owners

in fee simple of said premises and that they had good and marketable title to said premises; that under the said lease and pursuant to the terms thereof, The Texas Company entered upon the said premises and drilled three wells for oil to a depth of more than 4,800 feet, and at a reasonable cost for each of said wells of over \$65,000.00, in the year 1952, and obtained oil in each of said wells in commercial quantities in excess of 50 barrels of oil per day per well; that the first of said three wells reached oil on or about the 30th day of June, 1952, and became a regulated producer about the middle of July, 1952; that the second of said three wells developed oil on or about the 22nd day of August, 1952, and became a regulated producer on or about the 2nd day of September, 1952, and that the third of said three wells, hereinbefore referred to, developed oil on or about the 12th day of December, 1952, and became a regulated producer on or about the 16th day of December, 1952, and that the aggregate production from the said three wells so located, since their becoming regulated producers as hereinbefore set forth, up to the 30th day of December, 1952, being the date upon which this action was filed was on that date 51,232.53 barrels of oil, of an actual market value of \$105,686.34, all of which drilling and production occurred and accrued in the year 1952 and before the filing of this action by the plaintiffs.

## VII.

That in the month of May, 1943, and at all times prior thereto, the reasonable market value of the



premises described in plaintiffs' Complaint herein did not exceed Three Thousand Dollars (\$3,000.00); but by reason of improvements placed upon said premises by the defendants, Roy M. King and E. L. Grebe, as hereinabove alleged, and the wells drilled upon said premises for oil under Oil and Gas Leases given by the defendants, Roy M. King and Celia I. King, his wife, and E. L. Grebe and Caroline Grebe, his wife, as lessors, to The Texas Company, as lessee, the said premises have greatly increased in value and are now of a reasonable market value in excess of One Hundred Ninety-five Thousand and No/100 Dollars (\$195,000.00) and these answering defendants allege that the said premises were of a reasonable value in excess of One Hundred Ninety-five Thousand and No/100 Dollars (\$195,000.00) before the plaintiffs commenced this action by filing their Complaint in this Court on the 30th day of December, 1952.

\* \* \*

/s/ LOUIS P. DONOVAN,  
Shelby, Montana;

/s/ F. F. HAYNES,  
Forsyth, Montana; Attorneys for These Answering  
Defendants.

[Endorsed]: Filed February 13, 1953.

[Title of District Court and Cause.]

### DECISION

This is an action to quiet title to real property. Defendant Rosebud County, Montana, acquired fee simple title to the 640 acres of land involved herein, i.e., all of Section 15, Township 11 North, Range 32 East, M.P.M., the tax deed being issued by the County Treasurer of Rosebud County, Montana, to Rosebud County, Montana, under date of January 15, 1943, and showing a consideration of \$159.60, which represented the duly-assessed real property taxes on said land for the years 1935-36-37-38-39-40-41-42; unpaid and delinquent taxes over a period of eight years.

The abstract of title shows a quit claim deed dated May 21, 1927, from Frank R. Bentley to May W. Bentley, consideration of \$1.00, having been filed on August 24, 1939 (which filing was over 12 years after execution of said deed), conveying the land involved herein; and a quit claim deed, dated June 5, 1933, from Northern Pacific Railway Company, a corporation, to "Owner of the said land," consideration of \$1.00, conveyed "all mineral and rights of mining heretofore reserved by first party, to wit: \* \* \*," describing the land involved herein.

Counsel filed stipulation of facts at the time of the trial and the following certified photostatic exhibits were offered and received in evidence:

Exhibit "A," County Treasurer's Certificate of Tax Sale, numbered B No. 3031, dated July 15, 1936;

Exhibit "B," Tax Deed, dated January 15, 1943,

from the County Treasurer of Rosebud County to Rosebud County, Montana, certified by the County Clerk and Recorder, which contains pertinent facts set forth in Exhibit "A";

Exhibit "C," Contract for Deed, dated May 20, 1943, between Roy M. King and E. L. Grebe, and the Board of County Commissioners of Rosebud County, Montana, for purchase of said land, certified by County Clerk and Recorder.

Exhibit "D," consists of the following instruments certified by the County Clerk and Recorder:

Affidavit and Proof of Service, dated January 4, 1943;

Notice of Application for Tax Deed, dated October 13, 1942, To: May W. Bentley;

Affidavit of Publication, dated December 8, 1942, re: Notice of Application for Tax Deed, publication having been made on November 12th and 19th, 1942;

Envelope with return address "Guy W. Gray, Clerk and Recorder, Rosebud County, Forsyth, Montana," addressed to "May W. Bentley, Madison, Wisconsin," with postmark and stamps thereon;

Receipt for Registered Article No. 558, from County Clerk addressed to May W. Bentley, Madison, Wis.

Entry of filing of above instruments on January 15, 1943, by County Clerk and Recorder, Rosebud County, Montana.

Exhibit "E," consists of the following instruments certified by the County Treasurer:

Request for tax deed, dated January 15, 1943, by Clerk and Recorder to County Treasurer, Rosebud County, Montana;

Affidavit and Proof of Service, dated January 4, 1943, by County Clerk;

Notice of Application for Tax Deed, To: May W. Bentley, dated October 13, 1942, Rosebud County, Montana, by Guy W. Gray, Clerk and Recorder;

Entry of filing of above instruments on January 15, 1943, by Deputy County Treasurer, Rosebud County, Montana.

Exhibit "F," Quit Claim Deed, dated May 15, 1947, from Rosebud County, Montana, to Roy M. King and E. L. Grebe, of Sumatra, Montana, certified by County Clerk and Recorder.

On October 16, 1947, an action was instituted in State Court in the Sixteenth Judicial District in and for Rosebud County, Montana, by Roy M. King, Plaintiff, vs. William LaFurge, et al., (and May W. Bentley included), for the purpose of quieting title in and to "All of Section 15, Township 11 North, Range 32 East, M.P.M.," and judgment and decree signed and filed on August 31, 1948, to which further reference is hereinafter made.

Thereafter this action in federal court was commenced on January 6, 1953, by May W. Bentley, the former owner of record, and Raymond L. Rusnak and Joseph Homan, who by a Quit Claim Deed & Assignment, dated April 5, 1952, and filed Janu-

ary 14, 1953, for a consideration of \$100.00, acquired a one-half interest in and to the title or claim for title of May W. Bentley in the land involved herein, and was designated as an action to quiet title in fee simple absolute against any claims of the said defendants named herein to the said land.

It appears that in the County Treasurer's Certificate of Tax Sale, dated July 15, 1936, that the said real property was described as follows: "All Sec. 15-11-32."

Plaintiffs contend that such a designation of description is insufficient, and, therefore, the tax deed is invalid, and cite various authorities to the effect that where there is ambiguity and uncertainty such defects cannot be cured by evidence aliunde; citing *Miller vs. Murphy*, 119 Mont. 393, 175 Pac. 2d, 182; and reference is made to decisions in other States than Montana under statutes considered comparable to the Montana statute.

Defendant Rosebud County distinguishes from the *Miller* case, *supra*, and other cases cited by plaintiff, stating that in the *Miller* case the defective description was in the notice of application for tax deed, while in this case the abbreviated description was in the certificate of sale from the County Treasurer of Rosebud County to Rosebud County, Montana, and that the land as described in the assessment, notice of application for tax deed and the tax deed itself all contained the full description, i.e., "All of Section 15, Township 11 North, Range 32 East,

M.P.M.; that the certificate of sale is not notice to the owner that his property is for sale, nor to bidders that the land is to be sold but is given after the land is sold, and that the notice of sale was properly given as provided by Section 2182, R.C.M. 1935. Section 84-4124, R.C.M. 1947, as amended and reenacted by Section 1, Chapter 170, Laws of 1947, provides for validation with respect to certificates of sale as therein set forth. It further appears from the testimony of an expert witness in the field of civil engineering that the description in the certificate of tax sale is certain, and could not refer to any land other than the land described in the tax deed. In view of the foregoing it would seem to the court that the description used in this instance in the said certificate is not such an insufficient or ambiguous description as would invalidate the tax deed herein, and such is the finding of the court.

In respect to the tax title proceedings and the matter of compliance with Sections 2209 and 2212 of the Revised Codes of Montana, 1935, it appears that the affidavit herein provides such showing as the law requires and is therefore sufficient until any such alleged fact is proven otherwise by competent evidence.

The affidavit filed in the office of the County Treasurer states that the County Clerk and Recorder served a copy of the attached notice upon the owner of the property, namely, May W. Bentley, by depositing in the Postoffice at Forsyth, Montana, an envelope containing a copy of said Notice, securely

sealed, with postage both regular and for registration thereon, and marked "Return Receipt Requested"; said envelope being addressed as follows: "May W. Bentley, Madison, Wis."

The registered letter was addressed to the post office address of said owner as disclosed by the records in the office of the County Clerk and Recorder, as required by Section 2209. However, said Section 2209 further provides for publication, "\* \* \* provided, that in all cases where the post office address of the owner, mortgagee, or assignee is unknown, the applicant shall publish once a week for two (2) successive weeks \* \* \*."

The affidavit then states that the said letter was returned and is on file in the office of the County Clerk of Rosebud County, Montana; that he caused to have a notice of application for tax deed published in the Forsyth Independent for two consecutive weeks as is further shown by affidavit of publication which is on file in the office of the County Clerk of Rosebud County, Montana. In this case the records show, whether it was necessary or not, valid service was also effected by publication.

Plaintiff's counsel concedes that the Notice of Application for Tax Deed to May W. Bentley was attached to the Affidavit and Proof of Service and made a part thereof so that it could be considered by the County Treasurer with respect to service of notice by said registered letter and also service of notice by said publication; in said notice, dated

October 13, 1942, it is stated: "That the period within which the said above-described lands and premises may be redeemed from the sale to pay the taxes for the year 1935 has long since expired, and that the undersigned will, on the 15th day of January, 1943, which will be at least sixty (60) days after the service of this notice upon you, make application to the Treasurer of Rosebud County for tax deed to be issued to it as provided by law. \* \* \*."

Counsel for defendant relies upon the case of *Milne vs. Leiphart*, 119 Mont. 263, 174 Pac. 2d 805, at pages 808, 809, wherein it is stated:

"An affidavit was filed by the county clerk in the county treasurer's office showing that he deposited in the United States post office at Conrad an envelope containing a copy of the notice, by registered mail, postage prepaid, addressed to Harvey Leiphart, E. 724 Walton, Spokane, Washington. That was sufficient proof to justify the county treasurer in issuing the tax deed. \* \* \*."

It does not appear in the record there is any proof made that the notice required by Section 2209, *supra*, was not given, and with respect to proof this said Section also provides, in part, as follows: "\* \* \* In all cases due proof of service of notice in whatever manner given, supported by the affidavit required by law, must be filed immediately with the clerk and recorder of the county in which the property is situated, and be kept as a permanent file in his office,



and such proof of notice when so filed shall be prima facie evidence of the sufficiency of the notice.”

It is evident from the tax deed that in the procedure of the issuance and execution of said tax deed the County Treasurer, Bert Shotwell, personally appeared before the County Clerk and Recorder, Guy W. Gray, for the acknowledgement of the signature of the County Treasurer in his execution of said tax deed on January 15, 1943, which reads, in part: “\* \* \* the said grantee has given the necessary notice of application for tax deed as required by law. \* \* \*.” The instruments in Exhibit “D” herein at that time were on file in the office of the County Clerk and Recorder and available for inspection, as public records, by the County Treasurer, when he personally appeared in that office, for inquiry or question with respect to authority or jurisdiction or any other purpose, so that it would seem, in addition to the proof made herein, the maxim is applicable that means of knowledge and knowledge itself are, in effect, the same thing.

The above-quoted portion of the said notice, which was attached to and made a part of the required affidavit, and so conceded, as mentioned hereinbefore, to have been properly considered by the County Treasurer sets forth the requirements of Section 2209, *supra*, and the affidavit recited the registered letter containing said notice was actually mailed, and also he caused said notice to be published, as shown by the affidavit of publication filed in the office of the County Clerk and Recorder, which said

affidavit, when read in conjunction with the notice, makes the showing required by Section 2212, Revised Codes of Montana, 1935.

There is a question raised by the plaintiffs herein as to whether or not such time element of notice as shown by the affidavit and notice, when read in conjunction with each other, was actually given to meet the requirements of the statute in the determination of the County Treasurer. In this respect it would also seem proper to state that, of course, if the affidavit or instruments filed in the County Treasurer's office were false, anyone adversely affected thereby would have grounds for redress, and this is also true with regard to the affidavit and instruments filed in the County Clerk's office showing the proof of service of notice.

It is to be noted that Section 2209, *supra*, requires that due proof of service of notice be filed with the County Clerk, whereas, Section 2212, *supra*, does not require due proof of service to be filed in the office of the County Treasurer; all that is required is the filing of "an affidavit showing that the notice hereinbefore required to be given has been given as herein required."

In the case of *Cavitt vs. Seirson, et al.*, (1946), 119 Mont. 437, 175 P. 2d 767, it is stated the statutory presumptions "subsections 15 and 33 of section 10606, R.C.M. 1935, providing: 15. That official duty has been regularly performed. 33. That the law has been obeyed.", were applicable, when grounded upon an established fact, with respect to the record

failing to show whether or not the county clerk made and filed with the county treasurer the affidavit required by section 2212, and that such proof not appearing in the record the county treasurer was without authority to issue the tax deed. But in this instance, while there are established facts, i.e., all the necessary instruments of proof on file as public records, it does not seem that there was any presumption on the part of the County Treasurer.

The request for tax deed, dated January 15, 1943, which is the same date on which the said tax deed was executed, is a part of Exhibit "E" herein, and was filed with the County Treasurer by the County Clerk and Recorder, under his official seal, and sets forth a resume of all of the proceedings had pertaining to said land, including the official statement " \* \* \* and the time of redemption having elapsed, being five years from date of sale, and sixty days having elapsed since the giving of Notice of Application for Tax Deed, \* \* \*."

In view of the foregoing it does not appear necessary to give consideration to the contentions of the plaintiffs with respect to the quiet title action instituted in State Court on October 16, 1947, in Roy M. King, Plaintiff, vs. William LaFurge, et al., because it pertains to the title to the same land as was involved in the prior tax title action, and it also included May W. Bentley and Rosebud County, Montana, et al., as parties defendant; it was apparently an additional safeguard after pur-

chase of the tax title from Rosebud County, Montana, hence, any contentions of defects of any kind in that quiet title action could not be intermingled to defeat or affect the validity of the title acquired by Rosebud County, Montana, by the tax deed; it should be noted with respect to the status or relationship of the defendant Rosebud County herein that this action involves only one cause of action on the issue of title, that there is but one title to the said land and the reservation of 61¼% royalty to said county is a reservation out of the title transferred by quit claim deed from Rosebud County, Montana, to Roy M. King and E. L. Grebe; said deed being Exhibit "F" herein.

The case was tried May 26, 1954, and counsel were given 40 and 20 days for briefs after receipt of transcript. When plaintiffs filed their reply brief on October 6, 1954, they also filed a stipulation for voluntary dismissal with prejudice between the plaintiffs and the defendants, Roy M. King, Celia I. King, Edward L. Grebe and Caroline Grebe, and also on October 6, 1954, the order submitted was signed by the court, with each party to bear his own costs, providing: "\* \* \* the said-named defendants stipulate that they have compromised and settled all claims to the real property described in the plaintiffs' complaint, and that there are no issues remaining between the said plaintiffs and the said-named defendants, and that the said-named defendants have no interest in the claim between the plaintiffs and the defendant, Rosebud County, Montana, a body corporate, to a 61¼% royalty of

all oil, gas and minerals recovered and saved and to be recovered and saved from the lands described in the plaintiffs' complaint." "It is hereby ordered that the plaintiffs' complaint so far as it pertains to the defendants named in the said stipulation is dismissed with prejudice, and the Answer and Amended Answer of the said-named defendants, and the affirmative defenses therein, are likewise dismissed with prejudice, and each party is to bear his own costs. \* \* \*"

In view of the consideration of the evidence herein and the findings of the court it becomes evident that the court is of the opinion the proceedings conducted by the officers of Rosebud County to obtain a tax deed to the tract of land in question, to said county, disclose a sufficient compliance with the requirements of the laws applicable thereto and are therefore valid and thereby render the tax deed issued by the County Treasurer to Rosebud County a valid instrument; that the stipulation of dismissal with prejudice between plaintiffs and certain of the defendants, and the order entered thereon, do not affect the issue of title to be determined by the court, and such is the decision of the court herein. Exceptions allowed counsel. Findings of fact and conclusions of law and form of judgment may be submitted by counsel.

/s/ CHARLES N. PRAY,  
Judge.

[Endorsed]: Filed January 14, 1955.

[Title of District Court and Cause.]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause, an action to quiet title to real property, came on regularly for trial before the Court, sitting without a jury, on May 26, 1954. When plaintiffs filed their reply brief on October 6, 1954, they also filed a stipulation for voluntary dismissal with prejudice between the plaintiffs and the defendants, Roy M. King, Celia I. King, Edward L. Grebe and Caroline Grebe, and, also, on October 6, 1954, the order submitted was signed by the Court with each party to bear his own costs, providing: “\* \* \* the said-named defendants stipulated that they have compromised and settled all claims to the real property described in the plaintiffs’ complaint, and that there are no issues remaining between the said plaintiffs and the said-named defendants, and that the said-named defendants have no interest in the claim between the plaintiffs and the defendant, Rosebud County, Montana, a body corporate, to a 6¼% royalty of all oil, gas and minerals recovered and saved and to be recovered and saved from the lands described in plaintiffs’ complaint,” and accordingly it was ordered that the plaintiffs’ complaint, so far as it pertains to the defendants named in said stipulation, was dismissed with prejudice and the answer and amended answer of the said-named defendants and the affirmative defenses therein, were likewise dismissed with prejudice, each party to bear his

own costs, and the Court having duly considered the evidence, both oral and documentary, and the stipulation of the parties, and being fully advised in the premises, now finds as follows:

### Findings of Fact

#### I.

That the plaintiffs herein, May W. Bentley, Raymond L. Rusnak and Joseph Homan, are all non-residents of the State of Montana, being residents of the State of Illinois, and that all of the defendants are residents of the State of Montana, and that the amount in controversy exceeds \$3,000.00.

#### II.

That this defendant, Rosebud County, Montana, acquired title to the 640 acres of land involved herein, i.e., all of Section 15, Township 11 North, Range 32 East, M.P.M., by tax deed being issued by the County Treasurer of Rosebud County, Montana, to Rosebud County, Montana, under date of January 15, 1943, and showing a consideration of \$159.60, which represented the duly assessed real property taxes on said land for the years, 1935-36-37-38-39-40-41-42; unpaid and delinquent taxes over a period of eight years.

#### III.

That thereafter the county entered into a contract for deed, dated May 20, 1943, between Roy M. King and E. L. Grebe, and the Board of County Commissioners of Rosebud County, Montana, for

the purchase of said land, certified by the County Clerk and Recorder.

#### IV.

That a quit claim deed was executed, dated May 15, 1947, from Rosebud County, Montana, to Roy M. King and E. L. Grebe, of Sumatra, Montana, certified by the County Clerk and Recorder, excepting and reserving unto Rosebud County, Montana, its successors and assigns, a royalty interest of 6¼% of all oil, gas and minerals recovered and saved from said lands therein described, and duly recorded in the office of the County Clerk and Recorder of Rosebud County, Montana, on the 26th day of May, 1947, in Book 47 of Deeds, page 155, records of Rosebud County, Montana.

#### V.

That the proceedings conducted by the officers of Rosebud County to obtain said tax deed to the tract of land in question, to said county, disclosed the sufficient compliance with the requirements of the laws applicable thereto and are, therefore, valid and thereby render the tax deed issued by the County Treasurer to Rosebud County a valid instrument.

#### VI.

That the stipulation of dismissal with prejudice between plaintiffs and certain of the defendants and the order entered thereon does not affect the issue of title to be determined by the Court.



Conclusions of Law

I.

That the defendant, Rosebud County, Montana, acquired fee simple title to the 640 acres of land involved; that is, all of Section 15, Township 11 North, Range 32 East, by tax deed issued by the County Treasurer of Rosebud County, Montana, under date of January 15, 1943, and that by reason thereof the subsequent conveyance by the county reserving a  $6\frac{1}{4}\%$  royalty of all oil, gas and minerals produced and saved from said premises is a valid and subsisting reservation, and that Rosebud County is now the sole owner and entitled to receive said  $6\frac{1}{4}\%$  royalty of all oil and gas produced and saved from said premises.

II.

That the plaintiffs take nothing by their said complaint and that defendant have judgment for its costs and disbursements herein expended.

It Is So Ordered and counsel for defendant, Rosebud County, Montana, will submit appropriate judgment in accordance herewith.

Dated this 26th day of January, 1955.

/s/ CHARLES N. PRAY,  
United States District Judge.

[Endorsed]: Filed January 26, 1955.

The description of the real property contained in the County Treasurer's Certificate of Tax Sale, dated July 15, 1936, was not ambiguous to the extent that would invalidate the tax deed, dated January 15, 1943.

2. The District Court erred in admitting the testimony of H. D. Young to the effect that the description of the real property in the said Certificate of Tax Sale is certain and could not refer to any land other than the land described in the tax deed.

3. The District Court erred in concluding as a matter of law that the proceedings that were conducted by the officers of Rosebud County complied with the requirements of the laws of Montana applicable thereto, and that the said tax deed was a valid instrument.

4. The District Court erred in entering judgment for the appellee, Rosebud County, Montana, declaring that Rosebud County is the sole owner and entitled to receive  $6\frac{1}{4}\%$  royalty of all oil and gas produced and saved from the premises involved herein, and for costs.

BROWN, SANDE & FORBES,

ROCKWOOD BROWN, JR.,

By /s/ BEN N. FORBES,

Attorneys for Appellants, May W. Bentley, Raymond L. Rusnak and Joseph Homan.

[Endorsed]: Filed March 3, 1955.

In the District Court of the United States, in and  
for the District of Montana, Billings Division

Civil Cause No. 1460

MAY W. BENTLEY, et al.,

Plaintiffs,

vs.

ROSEBUD COUNTY, et al.,

Defendants.

Before: Honorable Charles N. Pray.

Billings, Montana, May 26, 1954

### PROCEEDINGS

Appearances:

MR. ARTHUR R. MEYER,

Attorney at Law,

Billings, Montana;

MR. CHARLES B. SANDE,

MR. BEN N. FORBES, of

MESSRS. BROWN, DAVIS & SANDE,

Attorneys at Law,

Billings, Montana,

For Plaintiffs.

MR. RUSSELL K. FILLNER,

MR. H. G. YOUNG,

Attorneys at Law,

Forsyth, Montana,

For Rosebud County.

MR. F. F. HAYNES,

Attorney at Law,

Forsyth, Montana;

MR. LOUIS P. DONOVAN,

Attorney at Law,

Shelby, Montana,

For Roy M. King, et al.

\* \* \*

Court resumed, pursuant to recess, at 2:00 o'clock p.m. on May 26, 1954, at which time all counsel were present as at the morning session.

The Court: Well, gentlemen, are you ready to proceed?

Mr. Sande: We are, your honor.

The Court: Very well.

Mr. Sande: May it please the court and counsel for defendants—first of all I would like to apologize to the court for the delay this morning, but I think that was well spent.

The Court: I have no doubt it was.

Mr. Sande: Your honor, so far as the opening statement in the case I realize the case has been up upon several different motions, and I am quite sure the court has an understanding of the issues involved in the case and we do not think it necessary to go into any opening statement.

The Court: I do not think it is necessary, and we can take whatever proof you have to take and any stipulation you may have.

Mr. Sande: In order to simplify the issues in the case I would like the record to show that the parties,

and all of the parties, have entered into a stipulation, stipulating as to certain facts and at this time the plaintiffs would like to offer in evidence Plaintiffs' [5\*] Exhibit No. 1.

Mr. Haynes: No objection.

Mr. Sande: Now, your honor, I would like the record to show this, there is a complete understanding I believe between counsel for both plaintiffs and defendants as to the effect of this stipulation. However, as an example, there are certain exhibits attached to this Exhibit No. 1, and what they are, they are copies.

The Court: Is that a stipulation with exhibits attached?

Mr. Sande: Yes, your Honor. Now in regard to the exhibits they actually are copies of the tax title proceedings, and it is our position that we are not stipulating that these are as to the legal effect or to the validity of the instruments but merely stipulating to the authenticity of the documents; is that correct?

Mr. Haynes: That is right.

The Court: Yes. [6]

\* \* \*

Mr. Sande: At this time the plaintiffs offer into evidence Plaintiff's proposed Exhibit No. 2, which purports to be a deed from Frank R. Bentley to May W. Bentley, the instrument being certified by the County Clerk and Recorder of Rosebud County, Montana.

Mr. Haynes: No objection.

Mr. Sande: There is no objection, your honor.

Mr. Fillner: No objection.

The Court: No objection, it may be received in evidence.

Mr. Sande: Does the record show I offered in [8] evidence Plaintiffs' proposed Exhibit No. 3? We at this time offer in evidence Plaintiffs' proposed Exhibit No. 3.

Mr. Haynes: No objection.

Mr. Fillner: No objection.

The Court: No objection, it may be received in evidence.

Mr. Sande: Your honor, that includes our proof except for the fact I would like to have the record state that the Plaintiffs stand ready and are ready and willing to pay any sums that might be found due in the event that judgment is in favor of the plaintiff for the payment of any taxes, penalty or interest and the reasonable value of any improvements placed upon the premises involved if demand is made—strike that if demand is made—if upon proof by the defendants of the amount. I would like to also at this time call attention to the court that it is provided in the stipulation that the Plaintiffs are all residents of States other than Montana and that the Defendants are residents of Montana. Further, that in the stipulation it has been agreed that the May W. Bentley is one and the same May W. Bentley in Plaintiff's Exhibit No. 2; and that Raymond L. Rusnak and Joseph Homan, Plaintiffs, are one and the same

persons as the grantees appearing in Plaintiff's Exhibit No. 3.

Mr. Sande: At this time, your Honor, the plaintiffs [9] rest.

The Court: Very well.

Mr. Haynes: Will you please mark these as Defendants' Grebe and King exhibits?

Mr. Haynes: Comes now the defendants and offer in evidence Defendants' Exhibit No. 4, which is a certified and authenticated copy of the judgment roll in civil case No. 5475, Roy M. King, Plaintiff, vs. William La Furge, et al., and becomes relevant in the case, sir, because of one of the affirmative defenses.

The Court: Any objection?

Mr. Sande: To which we object at this time upon the grounds that the said purported exhibit is incompetent and for the reasons that the judgment roll and particularly the affidavit of publication therein contained and the order for publication of summons affirmatively shows want of service upon the defendant therein, May W. Bentley; for the reasons that the said affidavit of publication of summons does not in any particular comply in its recitals with the controlling sections of our code in effect at that time, that is, Section 9482, R.C.M. 1935. (b) That no fair reading of the recitals of the affidavit for publication of summons justifies the conclusion that in substance if not in words there has been a compliance with Section 9482, [10] Revised Codes of Montana, 1935. (c) The evidentiary facts set out in the affidavit for publication of summons do not show diligence within the meaning and requirements of the Montana statutes in force and effect at the time

the said affidavit was made; that for the reasons and the grounds heretofore mentioned the recitals contained in the judgment to the effect "all of said defendants have been duly and regularly served with process in this action" should yield to what the judgment roll actually and affirmatively shows on its face and that therefore said judgment is not binding upon the plaintiff May W. Bentley or her transferees or assigns.

Mr. Forbes: On the further ground that the judgment roll affirmatively shows that the court named as the District Court of the Sixteenth Judicial District of the State of Montana in and for the County of Rosebud, did not have jurisdiction of the cause set forth in said judgment roll.

The Court: That is Exhibit 4, is it?

Mr. Sande: Yes.

The Court: It may be received subject to the objection presented.

Mr. Sande: Your honor, did you rule on Exhibit 4? I didn't hear what it was.

The Court: It will be received subject to the objections. [11]

Mr. Haynes: Comes now the defendants and offer in evidence their Exhibit No. 5 which constitutes an abstract showing the train of title through to the certificate of the particular land involved in this case.

The Court: Any objection?

Mr. Sande: At this time the plaintiffs object to defendants' proposed Exhibit No. 5, on the grounds that it is incompetent, irrelevant and immaterial;



that there is no proper foundation laid; also we object to the introduction of said exhibit for the reason that it is incompetent, irrelevant and immaterial in that a certain tax deed appearing at page 34 appears and there is no proper foundation laid for the introduction of the same in that there is no showing by the affidavit of proof of service by the County Clerk and Recorder filed in the County Treasurer's office showing the giving of proper notice for the application of said tax deed.

The Court: The same ruling as before; it will be received subject to the objections offered.

Mr. Haynes: Call H. D. Young. [12]

### H. D. YOUNG

was called as a witness for defendants, and having been first duly sworn, testified as follows:

#### Direct Examination

By Mr. Haynes:

Q. You may state your name, sir.

A. H. D. Young.

Q. You are engaged in what profession?

A. As Civil Engineer.

Q. You are also a member of the Bar of this State?

A. Yes.

Q. Where have you practiced your profession of engineering in the last two years?

A. Headquarters in Forsyth, Montana.

Q. In your capacity as engineer have you had occasion to familiarize yourself and are you familiar with the meridians and townships and ranges of the

Montana, and Roy M. King and E. L. Grebe, defendants. [15]

Mr. Sande: To which we object; the instrument is incompetent, irrelevant and immaterial and no proper foundation laid.

The Court: Same ruling.

Mr. Haynes: And we make the same offer to the affidavit of publication and proof of service in connection with the tax deed, and the same offer with relation to the notice of application for tax deed, which is also attached to the tax deed.

The Court: Your objections are continuing?

Mr. Sande: Yes, sir.

The Court: Same ruling.

Mr. Sande: We make the same objections.

Mr. Haynes: We make the same offer to the affidavit for publication attached to the stipulation.

The Court: Same objection and same ruling.

Mr. Haynes: We make the same offer with relation to the sheet showing receipt for registered article addressed to May W. Bentley of Madison, Wisconsin.

The Court: Same objection and same ruling.

Mr. Haynes: And the same offer with relation to the filing of the County Clerk and Recorder.

The Court: Same objection and same ruling.

Mr. Haynes: Same offer with relation to request to Bert Shotwell, County Treasurer, Rosebud County, Montana; [16] photostats being attached to the exhibit and the request being for the issuance of the tax deed.

Mr. Sande: Same objection.

The Court: Same objection and same ruling.

Mr. Haynes: And on the reverse side of the same photostat we offer the affidavit and proof of service of Guy W. Gray, Clerk and Recorder, Rosebud County, with relation to the application.

Mr. Sande: Same objection.

The Court: Same ruling.

Mr. Haynes: And we make the same offer with relation to the photostat attached to the stipulation, being the notice of application for tax deed addressed to May W. Bentley.

Mr. Sande: Same objection.

The Court: Same ruling.

Mr. Haynes: And we now make the same offer with relation to the quit claim deed, being the last photostat of the exhibit, passing from Rosebud County, Montana, to the defendants Roy M. King and E. L. Grebe.

Mr. Sande: Same objection.

The Court: Same ruling.

Mr. Haynes: Do you have, Mr. Clerk, the original deposition of Grebe in this case?

The Clerk: It hasn't been opened. [17]

Mr. Haynes: No. Well, we can open it.

Mr. Haynes: Comes now the defendants and all of them and offers in evidence the stipulation in this case of Edward L. Grebe taken at Helena, Montana, upon the application of the plaintiffs.

Mr. Sande: Deposition.

Mr. Haynes: Deposition. Pardon me. And the accompanying stipulation, if you will show it that way, Mr. Reporter.

Mr. Haynes: Now, would you give me a filing on this and then I will ask to have the filing made before the offer with your permission.

Mr. Haynes: Now, in offering the deposition and its accompanying stipulation may I request the court that the offer may be considered as having been made subsequent to the filing rather than before?

The Court: Very well, it may be considered.

Mr. Haynes: I assume it may be understood that the deposition may be considered as read to you?

The Court: Oh, yes, there is no need of my taking the time to read it now.

The Court: Is there anything to be said about the deposition?—I didn't read it. There is no objection?

Mr. Forbes: Your Honor, we have stipulated the deposition may be read and it is contained in our Exhibit 1. [18]

Mr. Haynes: We think that in our stipulation that we have so stated the case from its inception down and refer to the exhibits and everything of that kind so that the court will have upon the conclusion of the reading of that exhibit the complete case without exception. That is all.

Mr. Haynes: Now the record may show that the defendants Grebe and King rest.

Mr. Fillner: If it please the Court, the defendant Rosebud County, the offer made by counsel for the defendants Grebe and King, the same offer I presume will apply to the defendant Rosebud County?

The Court: Yes.

Mr. Fillner: In that case defendant Rosebud County rests.

The Court: Very well.

Mr. Sande: In regard to the rebuttal of the plaintiffs I wish to refer to Plaintiffs' Exhibit No. 1 and specifically to the exhibit attached and which is entitled County Treasurer certificate of tax sale which has formerly been offered in evidence by the defendants and we wish to withdraw any objection as to the offer in evidence of the specific item entitled County Treasurer Certificate of Tax Sale and offer the same in evidence ourselves. [19]

The Court: Very well, it may be received in evidence upon your offer. It has already been received subject to your objection before.

Mr. Sande: That is right, your Honor.

Mr. Sande: Also referring to Plaintiffs' Exhibit No. 1 and in particular to the attached exhibit and which is entitled affidavit and proof of service and which is filed in the County Treasurer's office and not in the County Clerk and Recorder's office, in regard to that particular exhibit we wish to withdraw any objections that we formerly had and at this time offer that particular exhibit specifically.

The Court: Very well, it may be received.

Mr. Sande: Your Honor, the plaintiffs rest.

The Court: That is your rebuttal. Very well, that terminates the case. Now you will want the record written up and upon the receipt of a copy of the transcript such as has been taken here this afternoon. How long a time do you need for briefs on the plaintiffs' side?

Mr. Sande: 40 and 20 days, respectively.

The Court: 40 days and 20 for reply?

Mr. Sande: 40 for plaintiffs, 40 for answer and 20 for reply to the defendants.

The Court: 40 days on a side?

Mr. Sande: Yes. [20]

The Court: And 20 for reply, plaintiffs' reply?

Mr. Sande: That is correct, your Honor.

The Court: Very well, we will so understand and it will be so noted in the record. That seems to be all for this afternoon. The court will stand in adjournment until nine-thirty tomorrow morning. (5/27/54—3:00 P.M.) [21]

### Reporter's Certificate

United States of America,  
State of Montana—ss.

I, Sidney O. Smith, do hereby certify that I am the official court reporter in the above-entitled court; that the foregoing and annexed transcription is a full, true and correct transcript of the proceedings had and testimony taken, Civil Cause No. 1460, May W. Bentley, et al., Plaintiffs, vs. Rosebud County, et al., Defendants, at Billings, Montana, on May 26, 1954.

Dated at Great Falls, Montana, this 10th day of June, 1954.

/s/ SIDNEY O. SMITH,  
Official Court Reporter.

[Endorsed]: Filed June 10, 1954. [22]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,  
District of Montana—ss.

I, H. H. Walker, Clerk of the United States District Court for the District of Montana, do hereby certify that the annexed papers are the originals filed in Case No. 1460, May W. Bentley, Raymond L. Rusnak, and Joseph Homan, Plaintiffs, v. Rosebud County, Montana, a body corporate; Roy M. King, sometimes Roy King, and Celia I. King, his wife, and Edward L. Grebe, sometimes E. L. Grebe, and Caroline Grebe, his wife, Defendants, and designated by the parties as the record on appeal in said cause; and I further certify that I transmit herewith, as a part of the record on appeal, the Reporter's Transcript of Record filed on June 10th, 1954, and the exhibits called for in the designations, to wit: Plaintiffs' Exhibit 1 (including Stipulation) and Plaintiffs' Exhibits 2 and 3, and Defendants' Exhibit No. 4.

Witness my hand and the seal of said Court at Great Falls, Montana, this 18th day of March, 1955.

[Seal]

H. H. WALKER,  
Clerk;

By /s/ C. G. KEGEL,  
Deputy Clerk.





No. 14693

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IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT

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MAY W. BENTLEY, RAYMOND L.  
RUSNAK and JOSEPH HOMAN,

*Appellants,*

v.

ROSEBUD COUNTY, MONTANA,  
a body corporate,

*Appellee.*

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Upon Appeal from the District Court of the United States  
for the District of Montana.

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**BRIEF OF APPELLANTS**

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BROWN, SANDE & FORBES,

*Attorneys for Appellants*

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Filed ....., 1955

....., Clerk

**FILE**

MAY 26 1955

PAUL P. O'BRIEN, C



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IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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MAY W. BENTLEY, RAYMOND L.  
RUSNAK and JOSEPH HOMAN,

*Appellants,*

v.

ROSEBUD COUNTY, MONTANA,  
a body corporate,

*Appellee.*

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## BRIEF OF APPELLANTS

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### Jurisdictional Statement

(1) Jurisdiction of district court.

The jurisdiction of the district court is based upon *Section 41 (1), Title 28, U. S. C. 1940 ed.*, providing that the district courts have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$3,000.00 and is between citizens of different states. Paragraphs I, II, III and IV of the Complaint (Trans. pp. 3 and 4) allege that May W. Bentley was a citizen of Oregon, Raymond L. Rusnak and Joseph Homan were citizens of Illinois, and Rosebud County, Montana, Roy M. King, sometimes Roy King, Celia I. King, Edward L. Grebe, sometimes E. L. Grebe, and Caroline Grebe were citizens of Montana, all at the time of the commencement of the action. Therefore, it was alleged that all the plaintiffs were citizens of states different from the state of which the defendants were citizens.

Paragraph V of the Complaint (Trans. p. 4) alleges that the matter is a civil action and that the value of the title of the land and the rents and profits therefrom, which is the matter in controversy, is of the value in excess of \$3,000.00. Exhibit 1 affirmatively shows the proof of these facts.

## (2) Jurisdiction of Circuit Court of Appeals.

The jurisdiction of the Circuit Court of Appeals is based upon *Section 227, Title 28, United States Code*. Judgment was entered by the district judge on January 26, 1955 (Trans. p. 33). Notice of appeal was filed by the appellants on February 18, 1955, within 30 days from entry of Judgment as required by *Section 227, supra*.

## Specification of Errors

### I.

The court erred when it concluded as a matter of law that the description of the real property contained in the County Treasurer's Certificate of Tax Sale, dated July 15, 1936, was not ambiguous to the extent that would invalidate the tax deed, dated January 15, 1943.

### II.

The District Court erred in admitting the testimony of H. D. Young to the effect that the description of the real property in the said Certificate of Tax Sale is certain and could not refer to any land other than the land described in the tax deed. The testimony of H. D. Young appears in the Transcript at pages 41 to 43. The objection made to his testimony is as follows:

"To this question we object on the grounds it is incompetent, irrelevant and immaterial and not the best evidence." (Trans. p. 42)

### III.

The District Court erred in concluding as a matter of law that the proceedings that were conducted by the officers of Rosebud County complied with the requirements of the laws of Montana applicable thereto, and that the said tax deed was a valid instrument.

### IV.

The District Court erred in entering judgment for the appellee, Rosebud County, Montana, declaring that Rosebud County is the sole owner and entitled to receive  $6\frac{1}{4}\%$  royalty of all oil and gas produced and saved from the premises involved herein, and for costs.

## Statement of the Case

This case concerns the ownership of a  $6\frac{1}{4}\%$  royalty interest in oil and gas on certain lands situated in Rosebud County, Montana, which royalty interest was purportedly reserved by the County of Rosebud in a deed from the County of Rosebud to one Roy M. King and Edward L. Grebe, former defendants in this action. The ownership of this  $6\frac{1}{4}\%$  royalty interest is the only matter to be determined in this cause, since a compromise has been made between the plaintiffs and all of the defendants except Rosebud County, Montana, concerning all of the other interests in the land involved, and the defendant Rosebud County, Montana, claims only the said  $6\frac{1}{4}\%$  royalty interest in the said lands.

The ownership of the  $6\frac{1}{4}\%$  royalty interest depends upon the validity of tax deed proceedings undertaken by Rosebud County, Montana; the plaintiff May W. Bentley was the owner of the lands at the time of the tax proceedings by Rosebud County, Montana, and the plaintiffs Raymond L. Rusnak and

Joseph Homan find title to a portion of the said lands from May W. Bentley.

To simplify the trial of this cause in the District Court, copies of all of the instruments connected with the tax title proceedings of Rosebud County, Montana, were attached to a Stipulation, which is Plaintiffs' Exhibit No. 1. The instruments attached thereto are marked Exhibits A through E. Plaintiffs' Exhibit No. 2 and plaintiffs' Exhibit No. 3 are deeds showing the title interest of May W. Bentley, Raymond L. Rusnak and Joseph Homan. Defendants' Exhibit No. 4 consists of a certified and authenticated copy of a judgment roll entitled Roy M. King, Plaintiff, v. William LaFurge et al. The foregoing are all of the exhibits before this Court and together with a short transcript of testimony constitute the whole of the evidence in this cause. None of the exhibits were printed in the transcript by the clerk of this Court, but the original exhibits are available for the use of the Court.

This case does not involve any factual conflicts whatsoever, i.e., there is no conflicting testimony and no conflict of fact contained in the exhibits.

This appeal therefore is confined strictly to the proper law to be applied to uncontradicted facts, to which this brief is now directed.

## **Argument**

### **I.**

THE TAX TITLE PROCEEDINGS UNDERTAKEN BY ROSEBUD COUNTY, MONTANA, ARE INVALID AND THE TAX DEED ISSUED TO ROSEBUD COUNTY, MONTANA, IS VOID.

There is no dispute in the record regarding plaintiffs' title



and ownership of the 6¼ % royalty interest up to the time of tax deed proceedings by Rosebud County, Montana. The tax deed proceedings by Rosebud County, Montana, are void for two reasons, viz., (a) the Affidavit and Proof of Service executed by the clerk and recorder of Rosebud County and delivered to the treasurer of Rosebud County was insufficient to give the treasurer of Rosebud County jurisdiction to issue a tax deed to the lands involved to the defendant Rosebud County, Montana, and (b) the County Treasurer's Certificate of Tax Sale does not contain a sufficient description of the real property involved, thereby rendering the whole of the tax proceedings void.

(a) We first discuss the insufficiency of the Affidavit and Proof of Service, which is part of Exhibit 1 (E), but since the instrument is short and its contents essential to the determination of this cause, we are setting forth the instrument here in its entirety, to-wit:

“AFFIDAVIT AND PROOF OF SERVICE

GUY W. GRAY, being duly sworn, on oath deposes and says:

That he is the duly elected, qualified and acting County Clerk of Rosebud County, Montana;

That *May W. Bentley*, named in the Notice of Application for Tax Deed attached hereto, is the owner..... of the property described therein, and that....., and that no other person, firm or corporation owned or held any portion of said property, or any other mortgage thereon, according to a search of the Rosebud County records;

That he served a copy of the attached Notice upon *May W. Bentley* by depositing in the Post Office at Forsyth, Montana, an envelope containing a copy of said Notice, securely sealed, with postage both regular and for registration thereon, and marked “Return Receipt Requested”, said envelope..... being addressed as follows:

May W. Bentley, Madison, Wis.,

That the said letter..... was returned and is on file in the

Office of the County Clerk of Rosebud County, Montana;

That he caused to have a notice of application for Tax Deed published in the Forsyth Independent for two consecutive weeks as is further shown by affidavit of publication which is on file in the office of the County Clerk of Rosebud County, Montana;

That the property described in said Notice is unoccupied;

That the property described in said Notice of Application for Tax Deed, for which Rosebud County claims title because of unpaid taxes thereon, pursuant to Section 2209 of the 1935 Revised Codes of the State of Montana, as amended by Chapter 105 of the 1939 Session Laws of the State of Montana, is as follows, to-wit:

All Section 15, Township 11 N. Range 32 E. M.P.M.

Guy W. Gray

County Clerk.

Subscribed and sworn to before me this 4 day of January 1943.

J. J. McIntosh

Notary Public for the State of Montana.

(Seal)

Residing at Forsyth, Montana.

My commission expires August 14th, 1943."

A copy of an instrument entitled "Notice of Application for Tax Deed" is referred to in the foregoing exhibit and was attached to same. We are also setting forth in its entirety the Notice of Application for Tax Deed, which is also part of Exhibit 1 (F), to-wit:

"NOTICE OF APPLICATION FOR TAX DEED.

To: May W. Bentley

You will please take notice that upon the 15 day of July, 1936,  
All Sec. 15, Tp. 11N. Rg. 32 E. M.P.M.

was after due and legal notice, sold for taxes; that said taxes upon the date of sale, to-wit: upon the 15 day of July, 1936, amounted to the sum of *Ten and 89/100 (\$10.89)* Dollars, which was the amount paid at said sale by the County of Rosebud, Montana, who is now the owner and holder of Certificate of Sale covering said above described lands and premises; that there is now due to the County of Rosebud the aggregate amount of *One Hundred fifty nine and 60/100 (\$159.60)* Dollars.

That subsequent to said sale and prior to the date hereof there have been duly assessed and levied against said real property taxes for the years 1935-36-37-38-39-40-41-42 which said taxes have become delinquent;

That the period within which the said above described lands and premises may be redeemed from the sale to pay the taxes for the year 1935 has long since expired, and that the undersigned will, on the 15 day of Jan, 1943, which will be at least sixty (60) days after the service of this notice upon you, make application to the Treasurer of Rosebud County for tax deed to be issued to it as provided by law.

That there is, therefore, now due to the undersigned, by virtue of the matter hereinafter set forth, the total aggregate sum of *One hundred fifty nine and 60/100 (\$159.60)* Dollars, being the total amount of the taxes, penalties, interests and costs for the years 1935-36-37-38-39-40-41-42 which said amount is necessary to be paid before redemption can be made.

Dated this 13 day of Oct., 1942.

ROSEBUD COUNTY, MONTANA,

By *Guy W. Gray*

Clerk and Recorder"

It is important to note at this point that the only instruments filed with the County Treasurer of Rosebud County are those instruments marked as Exhibit 1 (E) and that all of the instruments marked Exhibit 1 (D) were filed only in the office of the Clerk and Recorder of Rosebud County and *were not* filed with the County Treasurer's office. In other words, the only documents before the County Treasurer at the time the tax deed was issued were the Affidavit and Proof of Service heretofore set out, a copy of the Notice of Application for Tax Deed which was referred to in the Affidavit and Proof of Service and also heretofore set out, and an instrument called "Request for Tax Deed" which was neither verified nor referred to in the Affidavit of Proof of Service.

The insufficiency of the Affidavit of Proof of Service is determined by the case of

*Perry v. Maves*, (1951),  
125 Mont. 215,  
233 Pac. (2d) 820.

This case from the Montana Supreme Court in 1951 determines the requirements necessary to obtain a valid tax deed insofar as it concerns the Affidavit of Proof of Service. The Perry case, *supra*, has not been modified or reversed, and therefore, we submit, is controlling on this Court under the doctrine of *Erie Railroad Co. v. Thompkins*, 304 U. S. 64. In the Perry case, *supra*, the county clerk and recorder filed with the county treasurer an affidavit which stated:

“That on February 13, 1940, the undersigned filed in the office of the County Clerk and Recorder of McCone County, Montana, an Affidavit and Proof showing the manner in which said Notice of Application for Tax Deed was given, all as provided by the laws of the State of Montana, to which Affidavit and accompanying proofs you are hereby referred.”

The Montana court held that this affidavit was insufficient to give the county treasurer jurisdiction to issue a tax deed, the Court quoting from

*Jensen Livestock Co. v. Custer County*,  
113 Mont. 285, 295, 296, 124 Pac. (2d)  
1013, 1018, 140 A.L.R. 658,

as follows:

“the county treasurer’s jurisdiction to issue a tax deed must rest upon the affidavits of service required by the legislature to be filed with him.”

“Furthermore, the treasurer was not authorized to issue the deed. . . . Under the statute his jurisdiction arises solely from the affidavits of service which are filed with him, and not merely from the fact of service or from his knowledge of it otherwise than through the affidavits. . . . In other words, the treasurer has no jurisdiction to issue a

tax deed until there has been filed with him 'an affidavit showing that the notice hereinbefore required to be given has been given *as herein required*', etc." (citing cases)

Since under the law of Montana the jurisdiction of the county treasurer to issue a tax deed must be determined solely from the affidavit of proof of service filed with him by the purchaser of the lands (in this case the County of Rosebud, Montana), it is apparent in this pending action that the Affidavit of Proof of Service is insufficient to give to the county treasurer of Rosebud County, Montana, jurisdiction to issue a tax deed to the County of Rosebud for the reason that *the Affidavit of Proof of Service does not state when the Notice of Application for Tax Deed was served or attempted to be served upon May W. Bentley*. In other words, the county treasurer of Rosebud County, Montana, could not determine from the Affidavit of Proof of Service that the Notice of Application for Tax Deed was served, either by mailing or otherwise, at least 60 days before the county applied for a tax deed, which is required by *Section 2209, Revised Codes of Montana, 1935*, which reads in part as follows:

"The purchaser of property sold for delinquent taxes or his assignee must, at least sixty days previous to the expiration of the time for redemption, or at least sixty days before he applies for a deed, serve upon the owner of the property purchased, if known, and upon the persons occupying the property, if the said property is occupied . . . a written notice, stating that the said property, or a portion thereof, has been sold for delinquent taxes . . ."

Under the doctrine of the Perry case, *supra*, the defective failure to include in the Affidavit of Proof of Service a statement as to when service was made upon May W. Bentley is fatal to the tax title proceedings and the tax deed issued by the county

treasurer to Rosebud County, Montana, is void and no title at any time therefore vested in Rosebud County, Montana.

Nor is this defect cured by the publication that was made. It cannot be determined from the Affidavit of Proof of Service when the first publication was had, since the Affidavit of Proof of Service refers to an Affidavit of Publication not filed with the county treasurer, but retained in the office of the county clerk of Rosebud County, Montana, in direct contravention to the doctrine enunciated in the Perry case, *supra*. Section 2209, *Revised Codes of Montana, 1935*, requires that the first publication of the notice of application for tax deed must be made at least sixty days before the application for the tax deed.

Though the doctrine announced by the Perry case, *supra*, may seem technical or even harsh, it is beyond any doubt the law of Montana, and as the court said in that case:

“Proceedings on tax sales are *in invitum*. Every essential or material step described by the statute must be strictly followed. If the requirements of the statute are not strictly followed, the sale may be avoided. In the county treasurer’s proceedings to sell the lands, there is no distinction recognized between the mandatory and directory requirements of the statute. The county treasurer must act as the statute directs. Otherwise he acts without authority and the purported sale which he assumes to make is invalid. This holds true even though the requirement with which the county treasurer failed to comply was not one enacted for the protection of the owner of the land.”

Upon the trial of this cause, the appellee Rosebud County, Montana, maintained that the copy of the Notice of Application for Tax Deed which was attached and made a part of the Affidavit of Proof of Service affirmatively showed that sixty days had elapsed since the giving of notice to May W. Bentley. An examination of this Notice of Application for Tax Deed beyond

all doubt shows that same does not supply the defect stated above. The Notice of Application for Tax Deed recites:

“That at least sixty days will have expired after the service of this notice upon the defendant.”

Such a statement merely recited a fact that the county clerk and recorder intended to be done, and does not state that the fact or deed itself was done. For aught that appears from the Affidavit of Proof of Service together with the copy of the Notice of Application for Tax Deed referred to and attached to the Affidavit, attempted service upon May W. Bentley, the then record owner of the lands involved, was made less than sixty days prior to the request or application for the tax deed.

The learned trial judge in his written opinion that appears on page 23 of the transcript states that:

“The instruments in Exhibit ‘D’ herein at that time were on file in the office of the County Clerk and Recorder and available for inspection, as public records, by the County Treasurer, when he personally appeared in that office for inquiry or question with respect to authority or jurisdiction or any other purpose, so that it would seem, in addition to the proof made herein, the maxim is applicable that means of knowledge and knowledge itself are, in effect, the same thing.”

The above quoted portion of the judges’ opinion is directly contrary to the case of *Perry v. Maves, supra*, and in addition is directly contrary to

*Lowery v. Garfield County*,  
122 Mont. 571, 580, 208 Pac. (2d) 478,

wherein the Court stated:

“His authority to execute the deed must be shown in and appear upon the face of the affidavit.”

Appellee Rosebud County has contended that when a county applies for a tax deed, it is not necessary that *any* affidavit be filed in the office of the county treasurer. Such a contention is

wholly contra to the Perry case, *supra*. The Perry case unequivocally held that in order for McCone County, Montana, to obtain a valid tax deed to lands, a *sufficient* affidavit *must* be filed by the County of McCone with the county treasurer, and since no sufficient affidavit was filed, the tax deed issued to McCone County, Montana, was declared void. In view of this holding in the Perry case, to claim that no affidavit whatsoever need be filed is incomprehensible.

(b) We now direct this brief to the second defect in the tax deed proceedings of Rosebud County, Montana, i.e., the insufficiency of the property description contained in the Certificate of Tax Sale (Exhibit 1 (A)). This Certificate of Sale merely recites that

“Frank Bentley was duly assessed upon the assessment book of Rosebud County for the year 1935, for the following described real property, to-wit:

All Sec. 15-11-32.”

There is not, of course, any section of land in the state of Montana called “15-11-32”. The appellee claims that the real meaning of this description is Section 15 in Township 11, Range 32. The description, however, does not state that the figure 11 is referring to a township or that the figure 32 is referring to a range, and neither does the description state whether the township or range, if that are what the numbers refer to, are north or south of the base line or east or west of the meridian. It might well be said that the figures used in the tax certificate more closely resemble a social security number than they do a description of land.

At the trial of the case and over objection of the plaintiff, (Trans. pp. 41-43) parol evidence was introduced attempting to



explain and correct the mis-description involved. In the case of

*Miller v. Murphy*,  
119 Mont. 393, 175 Pac. (2d) 182,

the court said as follows:

“The land here sued for, as described in the complaint, is designated as “lots number 4 and 5, in Square number 39, of what has heretofore been known as the Fisher tract.” The land described in the assessment and the tax deed is as follows: “2/3 of Square 39 in Fisher tract.” The ambiguity patent on the face of this description is obvious. It may mean (1) an undivided two-thirds interest, held by the owner, Fisher, by way of tenancy in common; or (2) it may mean an entirety of two-thirds in area of the whole square. Which of the two is intended, it is impossible to say; and the ambiguity being patent, cannot be corrected by the introduction of extrinsic or parol evidence. Similar descriptions have been adjudged by other courts to be void for uncertainty. *Bidwell v. Coleman*, 11 Minn. 78, 91; *Adams v. Larrabee*, 46 Me. 516, 519; *Burroughs on Tax*, 203-205; *Hilliard on Tax*, 517, sec. 12.’ *Dane v. Glennon*, 72 Ala. 160, 162.

“In tax proceedings “the description must be certain of itself, *and not such as to require evidence aliunde to render it certain.* \* \* \* Certainty in the description is required to apprise the owner that his property is advertised for sale, and to enable him to prevent the sale by the payment of the taxes thereon, and to impart information to bidders of the actual extent and location of the premises to be sold. *All subsequent proceedings depend upon this certainty.* An inaccurate or an uncertain description defeats every step subsequently taken, and, as we have already said, *the uncertainty cannot be cured by evidence aliunde.*” *Keane v. Cannovan*, 21 Cal. (291), 302, 82 Am. Dec. 738. See, also, *Roberts v. Chan Tin Pen*, 23 Cal. (260), 267; *Mountain Club v. Pinney*, 67 Cal. App. (225), 251, 227 Pac. 630; *Miller v. Williams* (135) Cal. 183, 67 Pac. 788 and *Smith v. City of Los Angeles* (158 Cal. 702, 112 Pac. 307), *supra.*’ *Stewart v. Atkinson*, 96 Cal. App. 50, 273 Pac. 606, 608.”

Though the *Miller* case, *supra*, was concerned with the description in the Notice of Application for Tax Deed rather than

the Certificate of Tax Sale, the same principle applies to the Certificate of Tax Sale for it is from this certificate that the property description is obtained by the proper county officers on later instruments. In the case of

*Wilson v. Jarron* (Ida.),  
131 Pac. 12,

the court said:

“It will be noticed that this description does not recite the county in which the property is situated, nor does it state whether the township is north or south, nor does it show whether the range is east or west, nor does it give the meridian from which these numbers are computed. After the expiration of the three-year period for redemption from this sale, the taxes not having been paid, the assessor upon application of the owner and holder of the tax sale certificate issued to him a tax deed. This tax deed, which, by the way, was executed by the successor in office of the assessor who executed the tax sale certificate, describes the property conveyed as follows: ‘The south half of the Northeast quarter of section 1, township four north, range two West, Boise Meridian, Canyon County, State of Idaho.’ It is apparent, and must be admitted, that the description contained in the deed is a good description of the particular tract of real estate described in the deed. It is equally clear that the assessor who executed this deed could not, and did not, get this full description from the tax sale certificate which had been previously issued to his predecessor. It was necessary for him to ascertain in some other manner and from some other source that the township was north, instead of south, and that the range was west, instead of east, and that the county in which the property was located was Canyon.”

“It would, however, be a wide sweep of the imagination to say that, notwithstanding this variance, there has nevertheless been a substantial compliance with the statute, and that the description contained in this tax deed is substantially the same as that contained in the certificate. It is not substantially the same—the first description fails to locate or describe any tract of land. Reverting to the description

found in this certificate, and analyzing it for a minute, it will be seen that it would have been just as competent and equally as substantial a compliance with the statute for the assessor to have made a deed describing this property as being in township 4 south as 4 north, or in range 2 east as in range 2 west, either north or south of the base line.”

Even if the evidence of H. D. Young were admissible (which plaintiffs positively deny), his testimony at all times assumes that the figure “11” is referring to a township and that the figure “32” is referring to a range, without stating any custom or usage or other reason for these assumptions. (Trans. pp. 41-43)

## II.

ANY DEFENSE OF ADVERSE POSSESSION BY THE DEFENDANT, ROSEBUD COUNTY, MONTANA, HAS BEEN ABANDONED.

Though the appellee, Rosebud County, Montana, pleaded an affirmative defense of adverse possession, the only possible evidence introduced upon the trial of adverse possession was contained in a written deposition taken previous to the trial of the cause. This deposition has not been certified to this court, the deposition was not designated by either the appellant or the appellee to be part of the record on appeal, and therefore under the rules of this court such affirmative defense has been abandoned by the appellee and therefore no argument is made herein concerning the pleaded defense of adverse possession.

## III.

AFFIRMATIVE DEFENSE OF RES ADJUDICATA BY A FORMER JUDGMENT IS WHOLLY INSUFFICIENT.

The defendant, Rosebud County, Montana, has pleaded in its Answer (Trans. pp. 9-11) an affirmative defense of *res adjudicata* to the effect that the plaintiffs' claims are barred by reason of the rendition of a certain judgment in Civil Cause

No. 5475 in the District Court of the Sixteenth Judicial District of the State of Montana, in and for the County of Rosebud, wherein one Roy M. King is the plaintiff and Rosebud County, Montana, May W. Bentley, and unknown owners, etc., are the defendants. Appellants maintain that this judgment is not a bar to the appellants as against Rosebud County, Montana, for three reasons, which will be discussed separately below, to-wit:

(a) The estoppel of the judgment is not mutual between the appellants and Rosebud County, Montana;

(b) Rosebud County, Montana, and May W. Bentley were not adversaries in the previous action; and

(c) The court in which the judgment was obtained did not have jurisdiction over May W. Bentley.

(a) In order to discuss item (a), lack of mutuality of estoppel, it must be noted that no valid service was obtained upon the County of Rosebud, Montana, in the action in which the judgment was obtained that has been pleaded by the defendant, Rosebud County, Montana. It affirmatively appears from the judgment roll (Exhibit 4) that service of summons and complaint upon the body corporate, Rosebud County, Montana, was made by personally serving "G. W. Gray, Clerk, ex officio Board of County Commissioners, Rosebud County, Montana," whereas *section 9111, Revised Codes of Montana, 1935, paragraph 5* thereof, reads as follows:

"The summons must be served by delivering a copy thereof, as follows: . . . 5. If against a county, city or town, to the president or chairman of the Board of County Commissioners, president of the Council or trustees, mayor, or other head of the legislative department thereof."

It also affirmatively appears from Exhibit 4 that the default of Rosebud County, Montana, for failure to appear, answer or otherwise plead to the complaint was entered by the plaintiff

in the action that has been pleaded, and that Rosebud County, Montana, did not enter an appearance in the action. It therefore follows that in the action pleaded the court did not have jurisdiction over Rosebud County, Montana, and therefore Rosebud County, Montana, was not in anywise bound by the judgment obtained in that action.

Since the defendant, Rosebud County, Montana, was not and is not bound by the judgment they have pleaded as an affirmative defense, the law is clear that Rosebud County, Montana, cannot set up such a judgment as a bar against anyone else. The rule is probably best stated in

30 Am. Jur. 951,

wherein it is stated:

“ . . . One of the essential elements of the doctrine is that both the litigants must be alike concluded by the judgment, or it binds neither. Under this rule, if a judgment cannot be effective as *res adjudicata* against a person, he may not avail himself of the adjudication and contend that it is so available against others, as between them and himself.”

The Montana Supreme Court recognized this rule in the case of

*Wallace v. Goldberg,*

72 Mont. 234, 231 Pac. 56,

wherein the Montana court, quoting 1 Freeman on Judgments, 4th ed., Section 159, stated as follows:

“It is essential to an estoppel that it be mutual, so that the same parties or privies may both be bound and take advantage of it.”

“No man shall bind himself by any adjudication which he is himself at liberty to disregard.”

In the last cited Montana case, the rule announced was not applied, since the Montana court found from the facts that the judgment set up as a bar was mutual between the parties, but the case clearly shows that mutuality of estoppel is recognized

in Montana as it is in practically all other states. In the case of

*Bennett v. General Accident,  
Fire & Life Assurance Corp. (Mo.),  
255 S. W. 1076,*

the court said:

“The judgment must conclude both parties or it will conclude neither. Estoppels must be reciprocal and bind both parties; they operate only on parties and privies and can be used neither by nor against strangers. He that shall not be concluded by the judgment shall not conclude another by it. No person can bind another by any adjudication who was not himself exposed to the peril of being bound in a like manner had the judgment resulted the other way. Nobody can take benefit by a verdict that had not been prejudiced by it had it gone contrary.” (citing numerous cases)

Other cases announcing this rule are as follows:

*Davis v. First National Bank of Waco (Tex.),  
161 S. W. (2d) 467*

(“A party who is not bound by a judgment is not permitted to assert that another is estopped by it . . . (citing cases) The reason for this rule is the same as that which Freeman says ‘underlies the whole doctrine of res adjudicata’ and in his language is ‘that a person should not be bound by a judgment except to the extent that he, or someone representing him, had an adequate opportunity not only to litigate the matters adjudicated, but to litigate them against the party (or his predecessor in interest) who seeks to use the judgment against him.’ Freeman on Judgments, 5th ed., p. 918, paragraph 422.”)

*Schafer v. Robillard (Ill.),  
17 N. E. (2d) 963*

(“As to the claim of estoppel by Robillard’s suit to quiet title to the strip east of the east line of Osborne Avenue, it is only parties and their privies, in blood or estate, that are estopped by a decree or judgment. Parties to

a decree in the eye of the law are those, only, who are named as such in the record, and are properly served with process or enter their appearance. A privy to a judgment or a decree is one whose succession to the right of property thereby affected occurred after the institution of the particular suit, and from a party thereto.”)

Nor can the defendant, Rosebud County, Montana, claim that it is privy with Roy M. King, plaintiff, in the action pleaded as a bar, for Rosebud County, Montana, does not claim through Roy M. King or his successors, but rather claims ownership through a tax deed purportedly given prior to the time that Roy M. King received any color of title. The case of

*Teisinger v. Hardy*,  
86 Mont. 180, 282 Pac. 1050,

is one where the plaintiff therein claimed that a former judgment was binding against one of the defendants in the action even though such defendant was not a party to the former action upon the theory that such defendant was in privy with one of the parties to the former action previous to the time such action was commenced. The Montana court said:

“Freeman in his work on judgments declares that ‘it is well understood, though not usually stated in express terms in works on the subject, that no one is a privy to a judgment whose succession to the rights of property thereby affected occurred previously to the institution of the suit.’ (1 Freeman on Judgments, 4th ed., 162)

“One is not a privy to a judgment where his succession to the rights of property thereby affected occurred previous to the institution of the suit. . . .” (citing cases)

(b) The second reason why the judgment is insufficient as pleaded and proved by the defendant, Rosebud County, Montana, i.e., because the judgment acted both against Rosebud County, Montana, and the plaintiff herein, May W. Bentley,

is also a well recognized rule in the law of *res adjudicata* or estoppel by judgment. The general rule is stated in 30 Am. Jur. 966 as follows:

“The general rule is that parties to a judgment are not bound by it in subsequent controversies between each other, where they are not adversary in the action in which the judgment is rendered.”

At page 967:

“The theory of the many decisions supporting the general rule is that the judgment merely adjudicates the rights of the plaintiff as against each defendant and leaves unadjudicated the rights of the defendants as among themselves.”

This rule is recognized in Montana in the case of

*Hogan v. Thrasher*,  
72 Mont. 318, 233 Pac. 607,

where the court states:

“In passing we observe that, since Thrasher and Hogan were co-defendants in cause 517, the judgment in that action cannot be relied upon as *res adjudicata* in this one, unless they were adversary parties in that cause.”

The above statement was not necessary to the decision in the case cited, since the Montana court held that the judgment roll was not properly admitted in evidence, but the case does declare the doctrine in Montana.

The rule is likewise enunciated in

101 A. L. R. 105,

where it is said:

“... The rule supported by the great weight of authority is that a judgment in favor of the plaintiff in an action against two or more defendants is not *res adjudicata* or conclusive of the rights and liabilities of the defendants inter se in a subsequent action between them, unless those rights and liabilities were expressly put in issue in the first action, by cross complaint or other adversary pleadings and determined by the judgment in the first action.” (citing cases)



Again in 50 C. J. S. 372, it is said:

“The estoppel, however, is raised only between those who were adverse parties in the former suit and the judgment therein ordinarily settles nothing as to the relative rights or liabilities of the co-plaintiffs or co-defendants inter sese, unless their hostile or conflicting claims were actually brought in issue, litigated and determined. . . .”

Since it affirmatively appears in the judgment roll that neither Rosebud County, Montana, nor May W. Bentley, both named as defendants in the action pleaded as a bar to this suit, entered an appearance or filed any pleadings of any kind, it cannot be said that they were adversaries in the action pleaded, and under the rule as set forth above the defendant, Rosebud County, Montana, cannot bar the claim of the plaintiffs in this cause.

It should be noted by the court that the judgment pleaded by the defendant, Rosebud County, Montana, holds that neither Rosebud County, Montana, nor May W. Bentley, nor the other defendants, have any interest in the real property involved. Your writer is frank to say that he has found no cases wherein a judgment has been pleaded as a bar when the judgment pleaded states that the one setting up the judgment in the second action has no rights. Such an attempted defense of *res adjudicata* is anomalous and completely self-contradicting since the judgment set up as a bar by Rosebud County, Montana, purports to bar Rosebud County, Montana.

(c) The third and final reason why the judgment pleaded is no bar to the appellants herein is that no proper service of process in that action was had upon May W. Bentley, and therefore the court had no jurisdiction over her and likewise the judgment would then be not binding upon her assigns, the other plaintiffs and appellants in this cause. An examination of the

judgment roll (Exhibit 4) shows that there was no personal service upon May W. Bentley and such service as was had was made by publication of summons.

The procedure to obtain an order for publication of summons is set forth in *Section 9482, Revised Codes of Montana, 1935*, and we quote the pertinent parts involved:

“9482. Service of summons by publication, when. When any defendant specifically named in such complaint resides out of the state, or has departed from the state, or cannot, after due diligence, be found within the state, or conceals himself to avoid the service of summons, . . . , the plaintiff, upon the return of the summons showing due personal service within the state upon all defendants specifically named in the complaint, other than such as come within the meaning of the foregoing provisions of this section, and upon filing with the clerk of said court an affidavit *setting forth the facts with reference to any of such defendants* upon whom personal service of summons within the state cannot be made, within the meaning of the foregoing provisions of this section, may obtain an order for the service of summons upon such defendants last mentioned, to be made by publication.” (Emphasis ours)

To further abstract the above statute and so that this court can conveniently analyze the requirements, the four conditions are here set forth which must be shown in order that an order for publication of summons can be issued by the court, to-wit:

1. When any defendant resides out of the state;
2. When any defendant has departed from the state;
3. When any defendant cannot, after due diligence, be found within the state;
4. When any defendant conceals himself to avoid the service of summons.

First of all, it is to be noted that the four conditions as set forth above are actually “conclusions of fact.” Not only does the affidavit for publication of summons in question fail to set out any facts from which any one of the above conclusions can

be reached, but it doesn't even recite or allege the *ultimate conclusion of fact*.

In order to examine the affidavit for publication of summons involved, it is here set forth in its entirety, to-wit:

"AFFIDAVIT FOR PUBLICATION OF SUMMONS.  
Filed February 3, 1947.

F. F. Haynes, being duly sworn, deposes and says as follows:

I am the Attorney for the Plaintiff in the above entitled action. The complaint in said action was duly filed with the Clerk of this Court on the 16th day of October, 1947, and summons thereupon issued; and the said action is brought for the purpose of quieting title.

The Defendants hereinafter named last resided at: Lena E. Hess, Forsyth, Montana, Dorothy Hess, Forsyth, Montana; May W. Bentley, Madison, Wisconsin; (and other Defendants not pertinent to this abstract); diligent search and inquiry has been made in and about Rosebud County, Montana, for information as to the address of unserved defendants and except as hereinbefore set forth they cannot be determined; inquiry was made of the Forsyth, Ingomar, Vananda Postmasters and local merchants at said towns and of merchants and older residents and no present addresses determined;

That a Summons was duly issued out of this Court to the Sheriff of the County of Rosebud with directions to said Sheriff to serve the same upon said Defendants, and the said Sheriff returned the same to the Clerk of this Court, with his return thereon endorsed, to the effect that the said defendants could not be found in his County of Rosebud except as shown by his return.

I have fully and fairly discussed the facts of the case with the Plaintiff and I have informed him, and I verily believe, that he has a good cause of action in this suit against the said defendants, to whom the service of this summons is to be made, and that they each are necessary and proper parties to this action, as will fully appear by my verified complaint filed herein, to which reference is

hereby made, as I am advised by my said counsel after such statement made, as aforesaid, and as I verily believe.

Personal service of said summons cannot be made on the said Defendants not shown to have been personally served by the returns herein after due and diligent search and inquiry as above shown herein and I therefore demand an order that service of the same may be made by publication.

Signed, F. F. Haynes,  
Duly verified."

Now, to more or less dissect the above affidavit, following are listed the allegations set forth in the affidavit separately in order to ascertain if they fulfill the requirements of the aforementioned statute. They are as follows, to-wit:

1. The defendants hereinafter named last resided at: \* \* \* May W. Bentley, Madison, Wisconsin;
2. Diligent search and inquiry has been made in and about *Rosebud County, Montana*, for information as to the *address* of unserved defendants, and except as hereinbefore set forth they cannot be determined; inquiry was made of the Forsyth, Ingomar, Vananda Postmasters and local merchants at said towns and of merchants and older residents *and no present addresses determined*;
3. \* \* \* and the said Sheriff returned the same to the Clerk of this Court, with his return thereon endorsed, to the effect that the said defendants could not be found in his *County of Rosebud* except as shown by his return. (Even this allegation is shown by an examination of the judgment roll to be untrue as we will later develop);
4. Personal service of said summons cannot be made on the said Defendants not shown to have been personally served by the returns herein after due and diligent search and inquiry as above shown herein and I therefore demand an order that service of the same may be made by publication.

By comparing the four allegations as separately stated and numbered above with the four conditions as set out under *Section*

9482, *Revised Codes of Montana, 1935*, it is patent that there was not any compliance with the statute involved, and therefore because of the insufficiency of the affidavit for publication of summons, the order as issued by the judge was invalid and ineffective. The matter is controlled by the Montana case of

*Aronow v. Anderson*,  
110 Mont. 484, 104 Pac. (2d) 2.

We quote from that decision at two different places, the first on page 485 as follows:

“ ‘That the following named defendants (including Anderson) *reside out of the State of Montana*, and cannot after due diligence be found within the State of Montana, and thatt he last known residence’ of Anderson is Shelby, Montana.”

Even the above allegation at least sets forth the *ultimate conclusion* that the defendant “resides out of the State of Montana.” This is much more than the affidavit in question does. In holding that the affidavit in the Aronow case was insufficient, the court said as follows, at page 487:

“It is our view that under section 9482 the affidavit must show the evidentiary facts upon which the ultimate fact is asserted that the defendant resides out of the state before a valid order for publication of summons can be made. If this were not so, there would have been no occasion for section 9484. The naked allegation that defendant resides out of the state, without a statement as to where he does actually reside, is not sufficient without a recitation of facts upon which the ultimate fact is based. This is particularly true in view of the fact, as here, that it is recited that Anderson’s last known residence was Shelby, Montana, which negatives the idea that he was known to reside outside the state of Montana.

“Cases from other courts are of but little aid in view of differences in the statutes of the several states. See, however, cases listed in the note in 37 L. R. A. (n. s.) 211 et seq.”

Nor can the defendant, Rosebud County, Montana, argue that even if the affidavit for publication of summons is insufficient, the judgment is not subject to collateral attack. This question is adequately covered by decisions of the Montana State Supreme Court, and in particular we refer the court to the case of

*West v. Capital Trust & Savings Bank*,  
113 Mont. 130, 124 Pac. (2d) 572.

This case was decided in March of 1942 and sets forth the governing rules upon the question of collateral attack upon a judgment. For the court's guidance we quote at page 137 of that decision:

"If the allegations of the pleadings showed affirmatively a want of jurisdiction, then plaintiff's contention would be sound and there would be no presumption in favor of jurisdiction. The rule is stated in 34 C. J. 551, as follows: '*Where the facts upon which a court assumes jurisdiction are recited in the record, and appear by it to have been such as would not in law confer jurisdiction, the judgment may be impeached collaterally*'; for in this case there can be no presumption, in aid of the judgment, that the recitals of the record are incorrect or incomplete, or that something was due which the record does not show to have been done, the whole record being taken together for this purpose. Thus, where the judgment recites that defendant was duly served with process, but the record shows that no service was made, *or shows a service which is insufficient and unauthorized by law*, it may be collaterally impeached.'" (Emphasis ours)

We call the court's attention to the fact that in the West case they were dealing with a foreclosure suit, and not one dealing with an action to quiet title. Mention is made of this fact in the opinion rendered by Judge Angstman on the motion for rehearing. We specifically and emphatically call the court's attention to the term used "presumption of jurisdiction." The best example of this matter of indulging in a presumption of jurisdiction is in the type of case where there is a loss or absence

of parts of the record. In such cases the presumption of jurisdiction attaches, and the court presumes that there was at some time a proper instrument but that the same became lost from the record. As a matter of fact, this exact situation was present in the West case above quoted. We now refer the court to the case of:

*Hinton v. Staunton*,  
124 Mont. 534, 228 Pac. (2d) 461.

In this particular case the court held that the particular affidavit in question was sufficient, and we quote from that case as to the allegations contained in the affidavit, to-wit:

“ ‘the President, Vice President, Cashier or other officer of the said defendants \* \* \* Grass Creek Oil and Gas Company, a corporation, \* \* \* upon whom service could be made, *and that there is no such agent or officer of said corporation in the State of Montana* upon whom service could be had.’ ”

Here again at least the conclusion is stated that there was no agent or officer of said corporation in the state of Montana upon whom service could be had. Actually the Hinton case is no authority in regard to the question of the sufficiency of the affidavit in our present case. Such affidavit and order for publication of summons were obtained under the general statutes for service of Summons and in particular *Section 9112, Revised Codes of Montana, 1935*, and in the present case service was obtained under the special statutes contained in the Action to Quiet Title Section. Such a distinction between service on a corporation and service on an individual was an important factual element of that case.

It therefore affirmatively appears from the judgment roll and from the law of the State of Montana that due process was not followed in an attempt to obtain service by publication of summons upon May W. Bentley and that therefore the judgment

pleaded by Rosebud County, Montana, as a bar is void to May W. Bentley and her assigns.

### Conclusion

We submit that the tax deed obtained by Rosebud County, Montana, against May W. Bentley is void for the reasons that (1) the Affidavit of Proof of Service is insufficient under the doctrine announced by the Montana Supreme Court in the case of *Perry v. Maves*, *supra*, and (2) the Certificate of Tax Sale does not sufficiently describe the real property for which a tax deed was taken by the County of Rosebud, Montana, in accordance with the authorities herein cited.

The then only remaining question to be resolved is whether or not the judgment pleaded and in evidence was properly admitted in evidence, and, if so, whether such judgment is a bar to these appellants. We submit that it is not such a bar for the reasons that (1) the estoppel by judgment is not mutual, (2) there were no adversary proceedings between Rosebud County, Montana, and May W. Bentley in the action wherein the judgment pleaded was obtained, and (3) the judgment is not a bar to May W. Bentley or her assigns because no valid service was made upon May W. Bentley and therefore the court did not have jurisdiction over her, thereby rendering the judgment as against May W. Bentley a nullity.

Respectfully submitted,

BROWN, SANDE & FORBES

By CHARLES B. SANDE

*Attorneys for Appellants.*

By.....



No. 14693

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In The  
United States  
Circuit Court of Appeals  
For The Ninth Circuit

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MAY W. BENTLEY, RAYMOND L. RUSNAK  
and JOSEPH HOMAN,

Appellants,

vs.

ROSEBUD COUNTY, MONTANA a body  
corporate,

Appellee.

---

Upon Appeal from the District Court of the  
United States for the District  
of Montana.

FILED

JUN 25 1955

Brief of Appellee

PAUL P. O'BRIEN, CLERK

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Filed ....., 1955

....., Clerk



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IN THE  
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APPEALS FOR THE NINTH CIRCUIT

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Appellee.

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**BRIEF OF APPELLEE**

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**STATEMENT OF THE CASE**

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The plaintiffs-appellants (hereinafter referred to as plaintiffs), in their statement of the case fail to point out that the compromise between the plaintiffs and all of the defendants, except Rosebud County, resulted in a dismissal of plaintiff's complaint **with prejudice**. Further, the ownership of the 6¼% royalty interest depends not upon the validity of the tax deed proceedings undertaken by Rosebud County, Montana, but rather upon the validity of plaintiff's claim to title to the land—at least to the minerals.

## ARGUMENT

Plaintiffs open their argument with the statement that "there is no dispute in the record regarding plaintiffs' title and ownership of the 6¼% royalty interest up to the time of the tax deed proceedings by Rosebud County, Montana". This raises an interesting question at the outset, when we note that in Montana a royalty interest comprises no part of the fee; that is, it is merely an interest in the production from the land which attaches only upon the severance. It is not an interest in the land, but rather personal property, or, more aptly, a right to receive a certain percentage of the personal property if and when produced.

**Rist v. Toole County, et al, (1945),**

117 Mont. 426, 159 P. 2d 340;

**Mitchell, et al, v. Hannah, et al, (1949),**

123 Mont. 152, 208 P. 2d 812.

It would appear then that this entire question as to the ownership of the 6¼% royalty, so far as the plaintiffs are concerned, has become moot. Certainly, the validity of the 6¼% reservation in Rosebud County depends entirely upon title of the minerals in their grantees, Grebe and King. This paramount title having been recognized by the plaintiffs in the defendants, Grebe and King, necessarily recognizes the 6¼% royalty in the County. This is true when we note that plaintiffs' complaint was



dismissed with prejudice; that is, the defendants, Grebe and King, bought their peace and in nowise can it be said that they acquired any title from the plaintiffs. This being true, and from the very nature of a royalty being a right in the personality, that is, production from the land, plaintiffs' claim to the County's royalty cannot be sustained. In other words, the defendants, Grebe and King and the County, stand or fall together, so long as neither recognizes plaintiff's claim to title.

However, we need not stand on this proposition alone, for the tax title proceedings, whereby Rosebud County acquired fee simple title to this land, were and are valid and the former suit to quiet title is an effective bar to plaintiff's claim.

## **VALIDITY OF TAX TITLE PROCEEDINGS**

### **A.**

#### **The Affidavit**

Plaintiffs contend that the tax title proceedings are defective for two reasons; that is, that the affidavit and proof of service is insufficient, in that it does not state when the notice was mailed to May W. Bentley, and further, that the county treasurer's certificate of tax sale does not contain a sufficient description of the real property involved. Their contention that the affidavit is insufficient is based primarily on the doctrine enunciated in

**Perry v. Maves**

125 Mont. 215, 233 P. 2d 820.

It is submitted that this case is no authority whatever for counsel's contention in the instant case.

In the **Maves** case the **only** paper filed in the treasurer's office was a so-called affidavit and proof of service, which merely recited that the clerk,

“ ‘ . . . filed in the office of the County Clerk and Recorder of McCone County, Montana, an Affidavit and Proof showing the manner in which said Notice of Application for Tax Deed was given, all as provided by the laws of the State of Montana, to which Affidavit and accompanying proofs you are hereby referred.’ ”

The affidavit here is easily distinguished from the one the court was there dealing with. In this case the affidavit and proof of service filed with the treasurer specifically recites, among other things, that the clerk,

“ . . . served a copy of the **attached** notice upon May W. Bentley by depositing in the Post Office at Forsyth, Montana, an envelope containing a copy of said Notice, securely sealed, with postage both regular and for registration thereon, and marked ‘Return Receipt Requested’, said envelope being addressed as follows: May W. Bentley, Madison, Wis., . . . ” (Emphasis supplied)

This statement alone is sufficient to warrant the issuance of a tax deed. In

**Milne v. Leiphart,**

119 Mont. 263, 174 P. 2d 805,

at pages 808-809,

the court in passing on such an affidavit said:

“An affidavit was filed by the county clerk in the county treasurer’s office showing that he deposited in the United States post office at Conrad an envelope containing a copy of the notice, by registered mail, postage prepaid, addressed to Harvey Leiphart, E. 724 Walton, Spokane, Washington. **That was sufficient proof to justify the county treasurer in issuing the tax deed.**” (Emphasis supplied)

This decision conclusively establishes the validity of the tax deed in this case. It is to be noted that in that case the court was dealing with an affidavit similar to the one in this case, and, therefore, is direct authority for the sufficiency of the tax deed issued by reason thereof, whereas in the **Maves** case the court was there dealing with an affidavit entirely distinct and different from the one of this case and the **Leiphart** case.

Furthermore, in this case we have the additional fact that the affidavit filed with the treasurer also had attached thereto a copy of the notice that was served upon May W. Bentley. This notice, dated

October 13, 1942, specifically recites that at least 60 days will have expired after the service of this notice upon the defendant, setting forth the default day as being January 15, 1943, at which time the clerk would apply to the treasurer for a deed. This application or request for deed is dated January 15, 1943. The tax deed was issued on the same date. Also, the request for deed, which the affidavit and notice accompanied, specifically stated that more than 60 days **had elapsed** since the giving of the notice of application for tax deed.

Clearly then, upon the authority of **Milne v. Leiphart**, *supra*, 119 Mont. 263, 174 P. 2d 805, and as appears from the documents filed with the treasurer **without** reference to any other document dehors the record, it appears without question that the treasurer had jurisdiction to issue the tax deed.

**Perry v. Maves**,  
125 Mont. 215, at page 218,  
and cases therein cited.

To give the construction to the rule enunciated in **Perry v. Maves**, *supra*, that plaintiffs contend for would be not only disregarding the rule as stated in **Milne v. Leiphart**, *supra*, but also would in effect strike from our statute that portion of **Section 2209, Revised Codes of Montana, 1935**, which provides in part as follows:

“ In all cases due proof of service of notice in

whatever manner given, supported by the affidavit required by law, must be filed immediately with the **clerk and recorder** of the county in which the property is situated, and be kept as a permanent file in his office, and such proof of notice when so filed shall be **prima facie evidence of the sufficiency of the notice.**" (Emphasis supplied)

As pointed out by Judge Pray in his decision in this case, the above quoted section only requires that due proof of service of notice be filed with the county clerk, and does not require due proof of service to be filed in the office of the county treasurer; that all that is required is the filing of "an affidavit showing that the notice hereinbefore required to be given has been given as herein required". The affidavit in this case meets these requirements. **Milne v. Leiphart**, *supra*. Furthermore, the plaintiffs make no contention whatsoever that the 60 day notice was not given, nor that the affidavit, notice of application for tax deed or the request for tax deed filed in the county treasurer's office were false.

Although we believe the foregoing definitely establishes the validity of the tax title proceedings in this case, we seriously question the necessity of the affidavit being filed with the treasurer in this case in any event, and this, in spite of the fact that it is incomprehensible to the plaintiffs. It is to be noted

that **Section 2209.1, Revised Codes of Montana, 1935,** requires, in taking of tax deeds by counties,

“Whenever a county, city or town has become or hereafter becomes the purchaser of property sold for delinquent taxes, and is the holder of the certificate of sale when the time for redemption expires, the board of county commissioners . . . at any time thereafter deemed proper may order and direct the county clerk . . . to apply to the county . . . treasurer . . . for the issuance to the county . . . of a tax deed for such property, and it shall then be the duty of the county clerk . . . to give or post and cause to be published the proper notice of the application for such tax deed and to make the proper proof thereof, **all in the manner required by section 2209 . . .**” (Emphasis supplied)

This section last referred to requires only that due proof of service of notice supported by the affidavit required by law must be filed with the clerk and recorder of the county in which the property is situated, all of which was done in this case, as appears from those records on file in the county clerk and recorder's office, copies of which are stipulated to and marked “Exhibit D” herein.

This specific statute dealing specifically with the manner of taking of tax deeds by counties governs and controls this case over the general provisions of

of this state and of the United States. From this section the court takes judicial knowledge of the records of the land department of the United States, and by **Section 19-117, R.C.M. 1947**, must take judicial knowledge of the official map of Montana, which map contains the sections, townships and ranges, as shown by the records of the United States General Land Office survey.

What effect does this have on the description contained in the certificate of sale? To ask the question is but to answer it. It is rendered certain! For it is readily ascertainable from said map that not only is there but one Section 15-11-32 within Rosebud County, but that there is only one Section 15-11-32 within the entire State of Montana. Hence, this description, although incomplete, is not patently ambiguous, but is rendered certain from the deed itself in the light of the circumstances and not by any evidence aliunde.

**Frizeen v. Swanton (Ore.)**

34 P. 2d 939, at page 940.

Assuming for the sake of argument only that the description contained in the certificate of sale, being incomplete, is necessarily patently ambiguous, what is the effect in this case?

Plaintiffs have placed great reliance upon the case of,

**Miller v. Murphy,**

119 Mont. 393, 175 P. 2d 182,

but very carefully quoting from that case only that portion of it wherein the court speaks of the "tax proceedings". However, as plaintiffs mention, the particular tax proceedings that the court was there dealing with was the notice of application for tax deed. It was this **notice** that contained the defective description and **not**, as here, the certificate of sale. This is significant in view of the reasons given by our court for its requirement of certainty in the description, for as there stated:

"Certainty in the description is required to apprise the owner that his property is advertised for sale, and to enable him to prevent the sale by the payment of the taxes thereon, and to impart information to bidders of the actual extent and location of the premises to be sold."

Here the land described in the **assessment, notice of application for tax deed** and the **tax deed itself**, all contained a complete unquestioned description, all of which imparted notice to May W. Bentley.

The certificate of sale in nowise apprises the owner that his property is advertised for sale, and, of course, in nowise imparts information to bidders of the property to be sold, for it is given after the sale. It becomes apparent then that **Miller v. Murphy**, *supra*, is no authority for the proposition contended for by plaintiffs, and this is especially true when we note:

"That . . . in the year, 1935, the following describ-



ed property was duly and regularly assessed for taxes as required by law, to-wit: All of **Section 15, Township 11 North, Range 32 East, M.P.M., in Rosebud County Montana**; that said property was equalized as required by law and taxes were levied thereon in accordance with the law in said year 1935; that said taxes were not paid." (Emphasis supplied) (Paragraph 6, pages 2 and 3 of the Stipulation)

and that the notice of sale was properly given as provided by **Section 2182, Revised Codes of Montana, 1935.**

How then can plaintiffs assert that they have been deprived of any right or that the defective description in the certificate of tax sale, if defective, renders the tax deed void, for every record in this case which imparts notice to May W. Bentley contains the complete unquestioned description. These are: the assessment, the publication of notice as provided by **Section 2182**, which in turn refers to the assessment, the treasurer's book recording the tax sale, notice of application for tax deed, and the tax deed itself.

In addition to the foregoing, we think our court in **Miller v. Murphy**, *supra*, has recognized the distinction between mandatory and directory requirements contained in the sections of the code relating to tax proceedings. The rule is, as stated in

**51 Am. Jur., Section 652**

“While the statutes of most states provide in considerable detail how the work of assessing the taxes shall be performed, compliance with all these provisions in exact conformity to the law is not necessarily a condition precedent to a valid tax. The test is whether the provision is for the benefit and protection of the individual taxpayer or is merely for the orderly administration of public affairs. All those provisions which are intended for his security, for insuring an equality of taxation, and to enable one to know with reasonable certainty for what real and personal estate he is taxed, and for what all those who are liable with him are taxed, are conditions precedent which must be observed; otherwise, the assessment will be invalid. The provisions as to the form and mode of assessments, as to tax lists, and the place where the tax lists are to be deposited, are designed for the benefit of the taxpayers and the protection of their property from sacrifice, and are mandatory. Many regulations, however, are made by statute, designed for the information of the assessors and other officers, and intended to promote method, system, and uniformity in the modes of procedure, the compliance or noncompliance with which in no respect affects the rights of taxpaying citizens. Such provisions

may be considered directory merely, and non-compliance with them does not affect the validity of the tax. . . .”

Our legislature recognized that the provisions of the code relating to certificate of tax sale were not designed for the protection of the taxpayer but only for the orderly administration of public affairs in enacting **Section 84-4124, Revised Codes of Montana, 1947**, as amended and re-enacted by **Section 1, Chapter 170, Laws of 1947**, which provides in part:

“All certificates of sale heretofore issued to any county on the purchase by such county of real property sold at any delinquent tax sale and which certificates of sale are now held by such county, are hereby declared to be valid and subsisting certificates of sale for all purposes, notwithstanding any irregularities in the manner of publishing the delinquent tax list, or in holding such sale, or in selling such property **or in the issuance of such certificates of sale, or in the form thereof, provided the taxes for which such property was sold were taxes authorized by law to be assessed against such property, and were lawfully assessed against the same and have not been paid.**” (Emphasis supplied)

In view of this section, although we do not believe the tax sale certificate is irregular, any irregularity has been cured in view of the fact that the taxes for

which such property was sold were taxes authorized by law to be assessed against such property and were lawfully assessed and had not been paid, all of which appears from paragraph 6 of the stipulation herein.

We think the foregoing discussion conclusively establishes the validity of the tax proceedings in this case, but before leaving this question we wish to say a word about the Idaho case cited in plaintiff's brief,

**Wilson v. Jarron (Ida.),**

131 Pac. 12.

We submit that that case cannot be authority in this case, for the statutes there materially differ from the governing statutes here. This is readily apparent when we note that in Idaho, Sections 1763 and 1764 require that a tax deed contain the same description and recitals contained in the tax sale certificate. No such requirement is contained in the Montana codes.

In passing we think it is significant that in the Idaho case the court recognized that the assessor was justified in taking notice of the public surveys in that state. It is submitted that had the court there been dealing with a description as contained in the certificate of sale in this case, under the same circumstances, they would have found the description certain, for the assessor would have been justified in taking notice of the public surveys, which, in this

case, definitely establishes that there is but one Section 15-11-32 within the State of Montana, thus rendering the incomplete description certain.

In addition to the above facts, in this case we have the undisputed testimony of a qualified expert witness that the description "Section 15-11-32" could mean nothing but Section 15, T 11 N, R 32 E. (Tr. pp. 41-43)

In closing this part of the argument, we think it pertinent, in view of the length to which plaintiffs have gone in their endeavor to find defect in the tax title proceedings in this case, to point out what was said in our court in

**Cullen v. Western Etc. Title Co.,**

47 Mont. 513, at page 525,

134 Pac. 302

"... due process of law does not go to the length of requiring that tax proceedings 'be criticised with microscopic nicety' ..."

Indeed, plaintiffs in presenting the foregoing contentions have criticised these tax proceedings with microscopic nicety.

## **PLEA OF RES ADJUDICATA BY DECREE IN FORMER ACTION TO QUIET TITLE**

### **A.**

**Question of Mutuality of Decree and Whether  
Parties Were Adversaries in Previous Action**

Plaintiffs have apparently abandoned their position taken in their brief prepared for the trial court wherein they state:

“The question at this point is very simple, and is simply a matter of whether or not proper and valid service was obtained upon May W. Bentley as a defendant in the action to quiet title. If due process was observed and May W. Bentley was properly served, the contention of the defendant, Rosebud County, would be correct. . . .”

by briefing in this court the additional proposition of the judgment not being mutual and the parties not being adversaries. These new contentions of plaintiffs are without merit for the following reasons: First, it is to be noted in Montana, an action to quiet title is one in rem, not in personam.

**Heinecke v. Scott.**

95 Mont. 200, 26 P. 2d 167.

Second, an action to quiet title is by its very nature one in which all the parties are adversary and is for the purpose of establishing title, as is said in

**74 C.J.S., Sec. 105, page 160:**

“Decrees in suits to quiet title are intended to stand for all time as muniments of title.”

Finally, as the Montana Supreme Court stated in

**Brennan, et al, v. Jones, et al,**

101 Mont. 550, at page 563,

55 P. 2d 697

plaintiffs at page 21 of their brief point out that this judgment in fact does bar Rosebud County and May W. Bentley.

Second: When are co-defendants or co-plaintiffs adversaries in the cause? The Supreme Court of Arizona in the case of

**Ocean Accident & Guarantee  
Corporation v. United States  
Fidelity & Guaranty Co.,  
162 P. 2nd 609,**

has reviewed the authorities from all jurisdictions, and we shall briefly quote the decision:

“Nor does it matter that the parties in the former controversy were not in form placed in adversary positions. If they were proper parties in the former cause and the questions raised in the later cause between them were or could have been fully asserted and maintained in the former suit, the former judgment is res judicata, and the issues may not again be relitigated. *City of El Reno v. Cleveland-Trinidad Pav. Co.*, 25 Okl. 648, 107 P. 163, 27 L.R.A., N.S., 650, note page 651. A judgment under such circumstances conclusively determines as between the coparties, coplaintiffs or codefendants, issues which are raised and determined between them in the original action. *Louis v. Trustees of*

Brown Tp., 109 U.S. 162, 3 S. Ct. 92, 27 L. Ed. 892.”

The Appellate Court of California, in the case of  
**Klinker v. Klinker,**

283 P. 2d 83, on page 87,

has analyzed the question of the doctrine of res adjudicata as a bar, and gives the rule as follows:

“The application of the principle in a given case depends upon affirmative answers to the questions: Was the issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final judgment on the merits? Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?”

Taking the issues in the present appeal, let us determine whether the question of res adjudicata comes under the rule as laid down in this case. The action was one to quiet title in which Grebe and King were plaintiffs and May W. Bentley and Rosebud County, among others, were defendants. The matter went to judgment and the court decided the issues involved; that is, that title to the lands was in Grebe and King. Rosebud County and May W. Bentley were both parties to that action and the matter went to final judgment. Compare that with the case now on appeal.

In this action May W. Bentley and her privies



are plaintiffs and Rosebud County, among others, is defendant. The question involved again is the title to the same land and the parties involved are the same parties. Therefore, the rule as laid down in the above case is fully met; that is, the issues are the same, the parties involved are the same, and the matter went to final judgment on the merits.

It becomes apparent then that this defense was properly pleaded by the County, for the rule is, as stated in

**71 C.J.S., page 268:**

“A defense going to the merits of the whole case as showing no cause of action in the plaintiff may, when pleaded by one, inure to the benefit of all . . . ”

That is another way of saying what has been clearly stated in many Montana cases, that the plaintiff must recover upon the strength of his own title and not on the weakness of the defendant's title. This rule is stated in

**74 C.J.S., page 65,**  
that:

“Where plaintiff is not in possession of the property, a defendant in an action to quiet title may effectually resist a decree against himself by showing simply that the plaintiff is without title. . . . ”

Also see

**Fastenau v. Engel, (Calif.)**

270 P. 2d 1019.

The foregoing establishes that an action to quiet title bars any further questioning of that title between the same parties, as stated in

**50 C.J.S., page 241:**

“A judgment in an action to quiet title bars subsequent litigation on the same cause of action between the same parties or their privies, and is final and conclusive not only as to all issues actually involved and determined, but also as to such matters as should have been litigated and determined. A judgment quieting title cuts off all claims or defenses of the losing party going to show title in himself, from whatever source derived, and which existed at the time of the suit, whether or not pleaded therein.”  
(Emphasis supplied)

Also see

**Dern v. Tanner,**

96 F. 2d 401; Certiorari denied,

59 S. Ct. 82, 305 U.S. 621, 83

L. Ed. 397.

**Sherlock v. Greaves,**

76 P. 2d 87, 106 Mont. 206.

**B.****The court had jurisdiction over May W. Bentley  
in the former decree quieting title**

We come now to the third point raised by plaintiffs; that is, that the court did not have jurisdiction over May W. Bentley in the former action. In commenting upon that proposition we desire first to say that counsel are attempting to attack collaterally a final judgment of a court of competent jurisdiction. Therefore, the rules as to collateral attack of a judgment must apply. The Supreme Court of Montana in the case of

**West v. Capital Trust and  
Savings Bank,**

113 Mont. 130, 124 P. 2d 572,

has stated the rule of collateral attack upon a judgment as follows:

“The rule is well established that on such an attack there is a presumption of jurisdiction over the person of the defendant unless the contrary affirmatively appears from the judgment roll.”

(Citing cases.)

“This elementary rule is so well settled in this state that outside authorities need not be resorted to. However, the rule is so aptly stated in 34 C.J. 537 that it is well to repeat it here. It is there said: ‘In the case of a collateral

attack upon a domestic judgment of a court of general jurisdiction by a party thereto every reasonable presumption is indulged to support the judgment, and the burden is upon a party collaterally attacking a judgment to establish its invalidity. It will be presumed in such a case that the court had jurisdiction both of the subject matter and of the person, and that all the facts necessary to give the court jurisdiction to render the particular judgment were duly found, except where the contrary affirmatively appears. These presumptions are indulged where the record, although failing to show jurisdiction affirmatively, yet does not distinctly show a want of jurisdiction, as where the record of a judgment of a court of general jurisdiction is silent as to the facts conferring jurisdiction, or is defective in consequence of the omission of proper recitals or the loss or absence of parts of the record.' "

Thus, for example, if the judgment roll showed service on all of the defendants but one, it would not be deemed an affirmative showing of lack of jurisdiction where the court's decree has found that it has jurisdiction over the person omitted. The only time that it would affirmatively appear from the judgment roll that the court did not have jurisdiction would be where the return recited service on all

defendants except one, specifically naming him. Our court in

**Clinton v. Miller,**  
124 Mont. 463, at page 479,  
226 P. 2d 487,

has expressly so held in the following language:

“ . . . it is not the ‘return’ or other evidence or proof of service which gives the court jurisdiction over the person of the defendant but it is **the fact of service** that confers such jurisdiction.” (Emphasis theirs)

Here the court found that all parties were duly and legally served with summons. This established the fact of service, and since the record is not inconsistent with this finding, it cannot be collaterally attacked as attempted here.

We come now to a consideration of the sufficiency of the affidavit for publication of summons. It clearly meets the requirements of that portion of **Section 9482, Revised Codes of Montana, 1935**, which relates to service of summons by publication, “when any defendant specifically named in such complaint resides out of the state,” in that the affidavit clearly shows that the defendant, May W. Bentley, resides out of the state.

This is apparent when we look at the affidavit and note therefrom that it states:

The defendants hereinafter named last resided

**at: . . . May W. Bentley, Madison, Wisconsin . . . ”** (Emphasis supplied)

From this statement it clearly appears that the defendant resides out of the state, as it specifically states **where** she did reside. Had the affidavit merely stated that the defendant resided out of the state without any indication as to where she actually did reside, then the contention of the plaintiffs that a recitation of the facts upon which that conclusion was based would necessarily follow, but when, as here, the affidavit specifically states where she resides, such a recitation is unnecessary. We cite in support of this proposition the case relied upon by plaintiffs in their brief, which is

**Aronow v. Anderson,**

110 Mont. 484, 104 P. 2d 2.

In that case the affidavit recited the conclusion that the defendant resided out of the State of Montana, and that his last known residence was Shelby, Montana, not reciting the facts upon which the conclusion was based that he resided out of the state. Clearly the facts of this case and the one cited are materially different. It is to be noted that the court said in commenting on this situation:

“The naked allegation that defendant resides out of the state, **without a statement as to where he does actually reside**, is not sufficient without a recitation of facts upon which the ultimate

fact is based. This is particularly true in view of the fact, as here, that it is recited that Anderson's last known residence was Shelby, Montana, which negatives the idea that he was known to reside outside the State of Montana." (Emphasis supplied)

thereby definitely recognizing that had the affidavit contained "a statement as to where he does actually reside," as in this case, the affidavit would be sufficient.

We submit that this conclusively establishes the validity of the affidavit as a basis for the order of publication of summons.

## **DEFENSE OF ADVERSE POSSESSION**

Plaintiffs at page 15 of their brief state that Rosebud County has abandoned its affirmative defense of adverse possession. It is to be noted from the answer of the defendant, Rosebud County, Montana, herein, (Tr. pp. 6-12), that the County did not plead the defense of adverse possession. Therefore, it can hardly be said that we have abandoned it.

## **LACHES**

However, Rosebud County did plead in its answer the defense of laches. (Tr. pp 11-12). In asserting this defense, we are not unmindful that the question of laches depends upon the peculiar factual situ-

ation of each case and is not governed by any hard and fast rules. In our search of the reported cases we have failed to find any cases in the State of Montana that are squarely in point on the application of the doctrine of laches to bar a former owner in a tax title case. In this regard we might mention that at least one case is presently pending before the State Supreme Court on this very point and we anticipate that it will be decided prior to the hearing in this case. (*Hentzy v. Mandan Loan & Investment Co., et al.*)

However, we have been able to find various cases from other jurisdictions applying the doctrine of laches to bar a former owner in a tax title case.

**Nohl v. Holloway,**  
66 P. 2d 497;

**Buchanan v. Pitts,**  
111 F. 2d 599;

**Holliday v. Mangels,**  
33 F. Supp. 471;

**Aragon v. Empire Gold Mining &  
Milling Co.,**  
142 P. 2d 539;

**Tayloe v. Kjaer,**  
171 F. 2d 343.



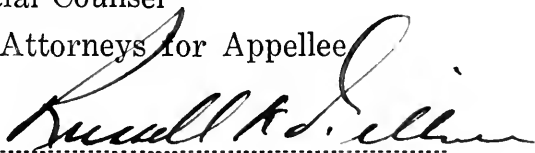
## CONCLUSION

We do not urge the bar of laches in this case strenuously, as we do not think that a determination of this case depends upon any consideration of laches. It is submitted that the plaintiffs are effectively and forever barred from maintaining this action by, first, the voluntary dismissal of their complaint herein with prejudice as between plaintiffs and the defendants, Grebe and King; second, the tax title proceedings herein; and lastly, by the former action to quiet title. Therefore, we respectfully submit that the trial court's decision is correct and should be affirmed.

Respectfully submitted,  
RUSSELL K. FILLNER  
County Attorney of  
Rosebud County  
H. G. YOUNG  
Special Counsel

Attorneys for Appellee

By

A handwritten signature in cursive script, appearing to read "Russell K. Fillner", written over a dotted line.



No. 14693

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IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT

---

MAY W. BENTLEY, RAYMOND L.  
RUSNAK and JOSEPH HOMAN,

*Appellants,*

v.

ROSEBUD COUNTY, MONTANA,  
a body corporate,

*Appellee.*

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Upon Appeal from the District Court of the United States  
for the District of Montana.

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**REPLY BRIEF OF APPELLANTS**

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BROWN, SANDE & FORBES,

*Attorneys for Appellants*

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Filed ....., 1955

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IN THE  
**United States Circuit Court of Appeals**  
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---

MAY W. BENTLEY, RAYMOND L.  
RUSNAK and JOSEPH HOMAN,

*Appellants,*

v.

ROSEBUD COUNTY, MONTANA,  
a body corporate,

*Appellee.*

---

**REPLY BRIEF OF APPELLANTS**

---

**Argument**

The defendant, Rosebud County, Montana, in the portion of their brief at the very outset are evidently attempting to assert that since the plaintiffs and appellants settled this case with the former defendants, Roy M. King et ux. and Edward L. Grebe et ux., the plaintiffs lost the right to appeal to this court from that portion of the judgment in favor of Rosebud County, Montana. No authority for this proposition as such has been cited by the defendant. This assertion by the defendant is made despite the findings of fact prepared and submitted by the defendant, No. VI of which reads as follows:

“That the stipulation of dismissal with prejudice between plaintiffs and certain of the defendants and the order entered thereon does not affect the issue of title to be determined by the Court.” (Trans. p. 30)

The defendant states that the royalty reservation made in the

deed from Rosebud County to King and Grebe depends upon title of the minerals in King and Grebe, apparently because of the theory advanced that a royalty reservation is only an interest in personal property. The two cases cited by the defendant in support of this latter proposition on page 6 of their brief hold only that a royalty is not an interest in the minerals in place; they do not hold that a royalty is not an interest in real property. The case of

*Marias River Syndicate v. Big West Oil Co.*,  
98 Mont. 254, 38 Pac. (2d) 599

holds that a royalty interest is an interest in the land itself, the court stating as follows:

“This right (royalty), if it belongs to the individual distinct from the ownership in other lands, takes the character of an interest or an estate in the land itself. It is an interest in the land, although incorporeal. *Williard v. Fed. Surety Co.*, 91 Mont. 465, 8 P. (2d) 633. Such an interest in land may be conveyed (*Krutzfeld v. Stevenson, supra*), and may likewise be excepted or reserved from conveyance.” (Pac. citation at page 601)

In order for the defendant to recover in this cause it must in any event show the validity of the tax deed proceedings which it has pleaded. The plaintiffs made out a *prima facie* case of ownership of all of the land and interest therein by the introduction without objection of the deeds to the plaintiff, May W. Bentley, and to the other two plaintiffs from May W. Bentley. At this point in the trial of the cause, the plaintiffs proved ownership of the lands involved and all of the interests therein and it then became incumbent upon the defendant to prove a superior title. See

*Collins v. Thode*,  
54 Mont. 405, 411, 170 Pac. 940, 941, and  
*Rude v. Marshall*,  
54 Mont. 28, 166 Pac. 298.

Both of the above cited cases held that the plaintiff, in a quiet title action, proves a prima facie case by proof of the delivery and execution of a deed covering the property involved to the plaintiff and that then the burden of proof was upon the defendant to show his title. The plaintiffs do not claim title through either Rosebud County, Montana, or through the other defendants with whom this cause was settled, and therefore defendant's statement that plaintiffs' case against the defendant, Rosebud County, Montana, is moot because the plaintiffs settled the case against other of the defendants is without merit, since the plaintiffs' claim to title is completely independent from any of the defendants.

Since *Section 93-6203, Revised Codes of Montana, 1947*, allows the plaintiff to quiet title against any person who claims or who may claim "any right, title, estate or interest therein", and since a royalty is an interest in land, the plaintiff has the right, and the court can adjudicate, the ownership of the royalty claimed by the defendant, Rosebud County, Montana.

## I.

### *VALIDITY OF TAX DEED PROCEEDINGS.*

The defendant states that the case of

*Perry v. Maves*,  
125 Mont. 215, 233 Pac. (2d) 820,

is "no authority whatsoever" for the plaintiffs' contentions in the instant case. Defendant states it is no authority for the reason that the affidavit in the Perry case is different from the affidavit in the instant case, and we readily concede that the affidavits are not identical. However, the principle of law enunciated in the Perry case, *supra*, is in point with the case here involved, that principle is the law of Montana, and, as

argued in plaintiffs' first brief, is controlling in the instant case. To the contrary, however, the case of

*Milne v. Leiphart*,  
119 Mont. 263, 174 Pac. (2d) 805,

cited by the defendant is not authority for the proposition that the affidavit in the instant case is sufficient. In the *Milne* case, it affirmatively appeared that the Notice of Application for Tax Deed was mailed on the same day that it was dated, more than sixty days prior to the actual application for the tax deed. It cannot be determined from the *Milne* case whether the date that the notice was mailed appeared in the affidavit or not, but the *Perry* case, decided after the *Milne* case, clearly requires that all the facts regarding the required service appear in the affidavit before the county treasurer has any jurisdiction to issue a tax deed.

Counsel for the defendant, in citing *Section 2209, Revised Codes of Montana, 1935*, which states that an affidavit must be filed with the clerk and recorder of the county in which the real property is situated, completely ignores *Section 2212, Revised Codes of Montana, 1935*, which requires that no deed shall be issued by the county treasurer to the purchaser of the property until after such purchaser shall have filed with the treasurer an affidavit showing that the notice required to be given "has been given as herein required." That the affidavit of service must be filed with the county treasurer before the treasurer has any jurisdiction to issue a deed to any person purchasing tax land is without any doubt the law of Montana and has been so held in a number of Montana cases without any decisions to the contrary. See

*Cullen v. Western Mortgage and  
Warranty Title Co.*,  
47 Mont. 513, 134 Pac. 302;

*Harrington v. McLean*,  
70 Mont. 51, 223 Pac. 912;

*Gallash v. Willis*,  
90 Mont. 148, 300 Pac. 569;

*Sanborn v. Lewis & Clark County*,  
113 Mont. 1, 120 Pac. (2d) 567;

*Jensen Livestock Co. v. Custer County*,  
113 Mont. 285, 124 Pac. (2d) 1013,  
140 A. L. R. 658; and

*B. Kesselheim, Inc. v. Cocklin*,  
116 Mont. 150, 148 Pac. (2d) 945.

All of the above cited cases held that before the county treasurer has any jurisdiction to issue a tax deed to a purchaser of tax lands from a county, an affidavit of service showing that notice of application for tax deed was properly served and/or published must be filed with the county treasurer. The above cited cases are given in addition to the Perry case, *supra*. The Perry case, *supra*, quoted Section 2212 as the court's authority requiring that a proper affidavit be filed with the county treasurer before the county treasurer has jurisdiction to issue a tax deed.

Defendant's contention that, though Section 2212 may require some purchasers to file an affidavit with the county treasurer, if the county is purchasing no such requirement is in effect, is directly contrary to the law set forth in the Perry case. At the time of the Perry decision, *Section 2209.1, Revised Codes of Montana, 1935*, relied upon by the defendant for its proposition, was in effect. Despite this statute, the Perry case required that a county must file a sufficient affidavit with the county treasurer in accordance with Section 2212 before the county can obtain a valid tax deed. The statement of the defendant that its suggested theory was not before the court in the Perry case is presumptuous; how does the defendant know what theories

were advanced to the Montana court in the Perry case? No matter what legal theory or theories were or were not advanced by counsel in the Perry case, that case held that a county must file a sufficient affidavit with the county treasurer to obtain a valid tax deed, and on the facts completely destroys any merit in the defendant's theory that the county need not file such an affidavit with the county treasurer.

The defendant in its brief apparently does not contest the fact that the affidavit filed with the county treasurer was not sufficient to show a proper publication of notice, but only argues that no publication of notice was required in the instant case. Defendant's reasoning for this contention is apparently upon the basis that the address of May W. Bentley was known, and therefore under the authority of *Section 2209, Revised Codes of Montana, 1935*, and *Milne v. Leiphart, supra*, no publication is therefore required. However, it affirmatively appeared from the affidavit of proof of service filed in the treasurer's office that *the registered letter mailed to May W. Bentley containing the notice of application for tax deed was returned unclaimed*. Under the authority of

*Sutter v. Scudder,*  
110 Mont. 390, 103 Pac. (2d) 303,

it then became imperative that the notice of application for tax deed be published, the court stating as follows:

“Had the registered letter not been returned to the sender, there would have been a strict compliance with the statute without the publication of notice. Since, however, that letter was returned, there was some proof that the address was then unknown, which made it necessary to publish the notice.”

The Sutter case is the law of Montana, and without any doubt requires that the notice of application for tax deed be published in accordance with *Section 2209, Revised Codes of Montana, 1935*. That the affidavit and proof of service does not properly

show a compliance with the publication requirement has been fully discussed in plaintiffs' first brief and need not be repeated here since the defendant has not disputed the insufficiency of the affidavit in that respect.

## II.

### *THE REQUIREMENTS OF MUTUALITY OF DECREE AND ADVERSARY PARTIES TO SUPPORT THE DOCTRINE OF RES ADJUDICATA.*

First, the practice of the defendant in apparently quoting, as the defendant has done on page 22 of its brief, from a brief prepared for the trial court in this cause is not proper since any briefs previously prepared for the trial court are not before the Circuit Court in any manner and such practice should not be permitted.

None of the cases cited by the defendant at pages 22 and 23 of their brief referring to the question of mutuality of remedy are in point to show that the remedy here was mutual between the parties. We have no argument with the statements by the defendant to the effect that a quiet title action is one *in rem* and not *in personam* and that decrees in suits to quiet title are intended to stand for all time as muniments of title. But these general propositions do not change the rule as it has been set forth in the plaintiffs' first brief that in order for one party to plead as res adjudicata, a judgment, such judgment must be mutual so that the other party could have pleaded same against the party setting up the judgment as a bar. Since, as pointed out in the plaintiffs' first brief, no proper service was rendered in the cause attempted to be set up as res adjudicata upon Rosebud County, Montana, neither the plaintiff, May W. Bentley, nor her successors could plead any judgment against Rosebud County, Montana, as a bar since obviously the court in that action did not have jurisdiction over Rosebud County.

Montana. Therefore, the defendant, Rosebud County, Montana, is attempting to set up as a bar a judgment against May W. Bentley that could not be set up by May W. Bentley against the county if the judgment has been in her favor. For this reason the judgment is not mutual and therefore comes squarely within the rule announced in the cases cited in the plaintiffs' first brief.

Nor is plaintiffs' position inconsistent as claimed by the defendant at page 24 of their brief. The plaintiffs merely claim that the defendant cannot set up the judgment as a bar against the plaintiffs for the reason that, since the court in the first action had no jurisdiction over the defendant, Rosebud County, Montana, the plaintiff could not set up the judgment against the county and therefore the remedy is not mutual. This in nowise admits that the judgment is binding against the plaintiffs. Certainly the defendant does not maintain that the judgment is a bar against either the plaintiffs or the defendant if no proper service of process was made upon either.

Counsel for the defendant have, no doubt unintentionally, mis-stated the contents of plaintiffs' first brief. The defendant states on pages 24 and 25 of its brief that the plaintiffs at page 21 of their brief "point out that this judgment in fact does bar Rosebud County and May W. Bentley." No such statement was made by the plaintiffs. The plaintiffs' brief at page 21 merely said that the judgment "purported to bar Rosebud County, Montana" and that the judgment pleaded "holds that neither Rosebud County, Montana, nor May W. Bentley, nor the other defendants, have any interest in the real property involved." These statements certainly do not say that "the judgment in fact does bar Rosebud County and May W. Bentley."

Turning now to the defendant's argument concerning the



requirement that parties must be adversaries in order that a judgment may be pleaded as res adjudicata against one or the other, let it be first said that the case of

*Ocean Accident & Guarantee Corp. v.  
United States Fidelity & Guaranty Co.,*  
162 Pac. (2d) 609,

cited by the defendant correctly states the law regarding the necessity that parties must be adversary before a judgment can be res adjudicata between them. Certainly, however, the defendant does not claim that any issues or questions between May W. Bentley and Rosebud County were asserted or maintained by either May W. Bentley or Rosebud County in the action pleaded since neither of the parties appeared, pleaded or took part in the former action. And likewise, no issues could have been raised between May W. Bentley and Rosebud County since neither appeared in the action. The second case cited by the defendant,

*Klinker v. Klinker,*  
283 Pac. (2d) 83,

has no application to the instant case since in the Klinker case there was no doubt about the fact that the parties were adversary and the requirement of adversary parties as applied to the doctrine of res adjudicata was not even mentioned by the California court in that case. The Klinker case merely recited the basic rules required for the application of the doctrine of res adjudicata between parties who were admitted adversaries without any doubt.

Likewise, the plaintiffs have no argument with the defendant's statement in their brief that the plaintiffs must rely upon the strength of their own title and not the weakness of their adversaries. However, the plaintiffs have shown their title by virtue of the deeds introduced in evidence by the plaintiffs,

the county has attempted to attack the plaintiffs' title by virtue of the tax deed and judgment pleaded as *res adjudicata*, and the defendant then has the burden of showing these defenses to be valid. There is no question of the plaintiffs' relying on the weakness of the defendant's title for the plaintiffs' title was proved without contradiction and the defendant has the burden of overcoming such *prima facie* case.

It must be noted that the defendant has not cited to this court even one case where judgment has been held to be *res adjudicata in favor of* a defendant against whom the judgment was rendered. For the defendant, Rosebud County, to set up a judgment as a bar against anyone, plaintiff or co-defendant, which judgment recites that Rosebud County has no right, is on its face illogical and anomalous.

### III.

#### *JURISDICTION OF THE COURT IN THE FORMER DECREE QUIETING TITLE OVER MAY IV. BENTLEY.*

Plaintiffs believe that their brief adequately covers the question of the adequacy or inadequacy of the service of process upon May W. Bentley in the quiet title action pleaded as *res adjudicata* with the exception of one point. The defendant states that since the affidavit for publication of summons in the former quiet title action stated the place where May W. Bentley resides, no evidentiary facts need be recited to show the basis for such recitation, citing the case of

*Aronow v. Anderson*,  
110 Mont. 484, 104 Pac. (2d) 2,

The defendant, however, overlooks that the affidavit does not state that May IV. Bentley resides at Madison, Wisconsin. It states only that May W. Bentley "last resided at" Madison, Wisconsin, without any statement as to where she actually pres-

ently resides and no facts showing any search for her actual and then present residence of any kind. Under the doctrine of the Aronow case, relied upon by the plaintiffs in their first brief, it clearly appears affirmatively from the judgment roll that no valid service of process was ever obtained on May W. Bentley and therefore the former quiet title action is no bar to the plaintiffs for this additional reason.

IV.

*LACHES*

Though the defendant did plead a defense of laches, there is no evidence of any kind in the record and before the court upon which the defendant can rely to show and prove any of the allegations of their defense of laches.

Respectfully submitted,

BROWN, SANDE & FORBES

ROCKWOOD BROWN, JR.

*Attorneys for Appellants.*

By.....



No. 14693

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In The  
United States  
Circuit Court of Appeals  
For The Ninth Circuit

---

MAY W. BENTLEY, RAYMOND L. RUSNAK  
and JOSEPH HOMAN,

Appellants,

vs.

ROSEBUD COUNTY, MONTANA a body  
a body corporate,

Appellee.

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Upon Appeal from the District Court of the  
United States for the District  
of Montana.

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Petition For Rehearing

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Filed ....., 1956  
....., Clerk

 STAR PTG. CO.

FILE

MAR - 2 1956



No. 14693

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In The  
United States  
Circuit Court of Appeals  
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MAY W. BENTLEY, RAYMOND L. RUSNAK  
and JOSEPH HOMAN,

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Petition For Rehearing

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Filed ....., 1956  
....., Clerk



STAR PTG. CO.





IN THE  
UNITED STATES CIRCUIT COURT OF  
APPEALS FOR THE NINTH CIRCUIT

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MAY W. BENTLEY, RAYMOND L. RUSNAK  
and JOSEPH HOMAN,

Appellants,

vs.

ROSEBUD COUNTY, MONTANA a body  
a body corporate,

Appellee.

---

PETITION FOR REHEARING

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Comes now Russell K. Fillner, County Attorney of Rosebud County, Montana, for and on behalf of the appellee above named, and respectfully petitions this Honorable Court, as constituted in the original hearing hereof, being the Honorable Orr and Lemmon, Circuit Judges, and Harrison, District Judge, for a rehearing of the above entitled cause, and in support of this petition represents to the Court as follows:

1. That this Court erred in its determination of the legal effect of the decision in *Milne v. Leiphart* 119 Mont. 263, 174 P. 2d 805, discussed on pages 5 and 6 of the Court's printed opinion.

2. The Court did not determine the defense of

laches pleaded by respondent and argued in its brief.

As to the first ground for this motion, it is respectfully submitted that the Milne decision is the law of the State of Montana and has not been overruled expressly or by implication as suggested by the Court by the later decision of *Perry v. Maves*, 125 Mont. 215, 233 P. 2d 820. This is for the reason that the affidavit in the Milne case was materially different from the affidavit the Court was dealing with in *Perry v. Maves* case, as this Court well knows. Furthermore, it is not consistent to hold that the Milne case "was overruled sub silentio by the later decision of *Perry v. Maves*", and at the same time not concede that the Milne case overruled "sub silentio" the cases preceding it.

There has been no contention in this case that the statutes of the State of Montana were not strictly complied with and that the notice referred to in the affidavit was not given for the time prescribed by law. To hold that the affidavit omitting this recitation thereby voids the tax title proceedings as distinguished from rendering them merely voidable, is substituting shadow for substance.

To illustrate, it cannot be questioned that if a summons were issued out of the Court directed to be served on the defendant named therein not less than twenty days before his default, and it was returned by the Sheriff with his indorsement there-

on to the effect that he had personally served a copy of the complaint and summons on the defendant, but failing to state **when** this service was made, nonetheless, any judgment rendered by the Court would not be void for want of jurisdiction, but merely voidable only upon a showing within the time prescribed by the statute that the twenty day period had not elapsed from the date of service to the date of default. *Clinton v. Miller*, 124 Mont. 463, at page 479, 226 P. 2d 487. Likewise, the recitation in the affidavit filed by the Clerk with the Treasurer of the fact of service of notice in the manner as required by the statute was sufficient proof to confer jurisdiction upon the Treasurer to issue the tax deed, and the defect in the affidavit of failing to state **when** this service was made renders the tax title proceedings voidable only, which must be taken advantage of within the period prescribed by the statute of limitations herein pleaded by the appellee in its answer.

Finally, if it is to be held that the *Milne* case was in fact overruled, still it is the law of this case, for it is well settled in this state that such overruling is to be given prospective effect only. This was specifically held in the case of *Montana Horse Products Co. v. Great Northern Railway Co.*, 91 Mont. 194, 7 P. 2d 919, and *Sunburst Oil & Refining Co. v. Great Northern Railway Co.*, 91 Mont. 216, 7 P.

2d 927, affirmed on writ of certiorari to U. S. Supreme Court, 287 U. S. 358, 53 S. Ct. 145, 85 A.L.R. 254. Also see Volume XIII, Montana Law Review, pages 74 through 92, and decisions therein cited.

The author of this Law Review article, in commenting upon the Montana decisions in this respect, states on page 89, that it is:

“firmly established . . . that where statutory or constitutional provisions are construed, any change in construction is to be given prospective effect only. Equally as well settled, and by many of the same cases since the two very frequently intertwine, is the proposition that where property or contract rights have vested, any change affecting them will be given prospective effect only.”

and concludes:

“ . . . it would seem that in the interest of doing effective justice the general rule ought to be prospective overruling, with retroactive overruling the exception.”

It is respectfully submitted that such ought to be the holding of the Court in this case, inasmuch as valuable property rights have vested in reliance upon the construction of the statutory provisions in the Milne case relating to the sufficiency of the affidavit to be filed with the County Treasurer. It is true that the Milne decision came after the filing of the affidavit in this case, but it is significant that the Milne case confirmed the type affidavit that was filed in this case, thereby precluding the neces-

sity of any affirmative or remedial action by the County. This may be argued that it requires the Court to indulge in a presumption of reliance, which we believe is a safe presumption. However, in any event, it certainly requires no indulgence in any presumption to determine that the County relied on the decision of the Milne case in the instant case.

Therefore, it is respectfully submitted that the Milne case has not been overruled expressly or "sub silentio" by the Maves case; that if said case is held to be overruled, it is by the action of this Court in applying what it finds the state law to be, which overruling can have prospective effect only under the Montana decisions, which are conclusive upon this Court under the doctrine of the *Erie Railroad Co. v. Thompson* case.

As to the defense of laches, in addition to the authorities cited on page 34 of our original brief on appeal, we cite the following Montana cases on the subject of laches:

Riley v. Blacker, 51 Mont. 364, 370, 152  
Pac. 758

Hynes v. Silver Prince Mining Co., 86 Mont.  
10, 281, Pac. 548

Ackey v. Great Western Bldg. & Loan Assn.,  
110 Mont. 528, 104 P 2d 10.

In our original brief on this subject, we pointed out to the Court that at least one case was pending before the State Supreme Court on the question of

laches. Although this case, *Hentzy v. Mandan Loan & Investment Co.*, 286 P 2d 325, was decided on other grounds, there is a tacit approval of the defense of laches in such case, inasmuch as the trial Court barred the defendants by laches and the Supreme Court affirmed the holding of the trial Court, although without reference to the question of laches. Is this not affirming "sub silentio" the doctrine of laches in such case as this?

In that case the doctrine of laches was interposed by the plaintiff against the defendant, the admitted patent owner of the lands in question, an apparent extension of the doctrine of laches to the point that it is used as a sword for the investiture of legal title, rather than a shield of equitable defense as traditionally applied and as pleaded in this case. Furthermore, in the *Hentzy* case there was no evidence of an actual increase in value of the land as here by reason of oil and gas development, but merely speculation of increase in value by reason of oil and gas development in the vicinity. Certainly then, if the doctrine of laches was tacitly affirmed in that case, it is respectfully submitted that it should be expressly declared to be a bar in this case.

This petition is made upon the foregoing grounds and on the records, briefs and files herein, and supported by certificate of counsel for appellee attached hereto that in his judgment it is well founded and it is not interposed for delay. Special counsel for Re-

spondent has not joined this petition by reason of his death Dec. 4, 1955.

WHEREFORE, your petitioner respectfully petitions and moves the Court for a rehearing of its decision on appeal rendered herein, and that upon such rehearing that this Court vacate its opinion rendered herein and affirm the decision of the lower Court, and for the foregoing reasons.

Respectfully submitted,

RUSSELL K. FILLNER

County Attorney of

Rosebud County

Attorney for Appellee.

### **CERTIFICATE OF COUNSEL**

The undersigned, Russell K. Fillner, County Attorney of Rosebud County, Montana, and attorney for petitioner, hereby certifies that the Petition for Rehearing filed in this case is presented in good faith and that in his judgment it is well founded and is not interposed for delay.



RUSSELL K. FILLNER,

County Attorney of

Rosebud County, Montana,

Attorney for Petitioner.





United States  
Court of Appeals  
for the Ninth Circuit

---

ELLA E. HARROLD,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

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Transcript of Record

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Petition to Review a Decision of The Tax Court  
of the United States

FILED

OCT 20 19

PAUL P. O'BRIEN,



No. 14694

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United States  
Court of Appeals  
for the Ninth Circuit

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ELLA E. HARROLD,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Internal Revenue Service,  
Washington 25, D. C.  
Counsel for Appellee.





## The Tax Court of the United States

Docket No. 40953

ELLA E. HARROLD,

Petitioner,

VS.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

## APPEARANCES

For Petitioner:

David Livingston, Esq.

Louis F. Di Resta, Esq.

**For Respondent:**

C. W. Nyquist, Esq.

R. W. Whitley, Esq.

## DOCKET ENTRIES

1952

May 14—Petition received and filed. Taxpayer notified. Fee paid.

May 14—Request for Circuit hearing in San Francisco filed by taxpayer. Granted 5/22/52.

May 16—Copy of petition served on General Counsel.

May 22—Entry of appearance of Louis F. Di Resta  
as counsel filed.

July 15—Answer filed by General Counsel.

July 15—Request for Hearing in San Francisco,  
Calif. filed by General Counsel.

July 18—Copy of answer and request served on taxpayer, San Francisco, Calif.

1953

Jan. 30—Hearing set March 23, 1953, San Francisco, Calif.

Mar. 23—Hearing had before Judge Van Fossan on parties motion to continue. Granted. Continued generally on San Francisco calendar. Motion filed and served at hearing.

Apr. 16—Transcript of Hearing 3/23/53 filed.

July 31—Hearing set Nov. 2, 1953, San Francisco, Calif.

Nov. 2—Hearing had before Judge Rice on merits. Stipulation of Facts filed. Petitioner's brief due January 4, 1954; respondent's brief due February 18, 1954. Petitioner's reply due March 19, 1954.

Nov. 25—Transcript of Hearing 11/2/53 filed.

1954

Jan. 4—Brief filed by taxpayer. Copy served 1/4/54.

Feb. 18—Answer brief filed by General Counsel.

Mar. 17—Motion for extension to April 19, 1954 to file reply brief filed by taxpayer. Granted 3/17/54.

Apr. 12—Reply brief filed by taxpayer. Copy served.

Jun. 22—Opinion filed, Judge Rice, Decision will be entered under Rule 50. Copy served.

Oct. 22—Computation filed by General Counsel.

Oct. 26—Hearing set December 1, 1954 on respondent's computation.

Nov. 26—Objections to respondent's computation filed by petitioner. Copy served 11/29/54.

1954

Nov. 26—Petitioner's computation filed. 11/29/54, copy served.

Dec. 1—Hearing had before Judge Rice on settlement under Rule 50. Ordered, decision pursuant to respondent's computation to be entered.

Dec. 7—Request for leave to file motion for further hearing to present additional evidence and for reconsideration, motion for further hearing to present additional evidence and for reconsideration lodged, filed by taxpayer.

Dec. 9—Request for leave to file motion for further hearing to present additional evidence and for reconsideration, granted. Motion for further hearing to present additional evidence and for reconsideration filed and denied.

Dec. 13—Transcript of Hearing 12/1/54 filed.

Dec. 20—Decision entered, Judge Rice, Div. 12.

1955

Feb. 1—Petition for review by U. S. Court of Appeals, Ninth Circuit, with assignments of error filed by taxpayer.

Feb. 8—Proof of service filed.

Feb. 8—Designation of Contents of Record with attached affidavit of service by mail filed by petitioner.

Feb. 8—Order extending time to May 2, 1955 for filing record and docketing the appeal, entered.

[Title of Tax Court and Cause.]

## PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency, IRA:90-D:HM, dated February 21, 1952, and as a basis of her proceeding alleges as follows:

1. The petitioner is an individual residing at 1980 Washington Street, San Francisco, California. The returns for the periods here involved were filed with the Collector for the First District of California.

2. The notice of deficiency (a copy of which is attached hereto and marked Exhibit A) was mailed to the petitioner on February 21, 1952.

3. The taxes in controversy are income taxes for the calendar years 1946, 1947 and 1948, and in the amounts of \$17,523.07, \$8,368.90, and \$6,991.66, respectively.

4. In determining the taxes set forth in said notice of deficiency, the following errors were committed:

(a) The Commissioner erred in holding that petitioner is chargeable with one-half community share of salary received by Ellsworth Harrold, the petitioner's husband for each of the years in question.

(b) The Commissioner erred in holding that the cost basis of the stocks sold by petitioner during

each of said calendar years, is the cost to the community.

(c) The Commissioner erred in holding that these stocks were received by the petitioner as a division of community property.

(d) The Commissioner erred in not using as a cost basis for these stocks, the fair market value of the stock when received by the petitioner.

(e) The Commissioner erred in determining a deficiency against petitioner for each of said years.

(f) The Commissioner erred in determining and assessing a deficiency for the years 1946 and 1947, because assessments for said years and each of them are barred by the statute of limitations.

(g) The Commissioner erred in holding that the five-year period of limitation for assessment provided in Section 275 (c) of the Internal Revenue Code is held to be applicable to the taxable years ended December 31, 1946 and December 31, 1947.

5. The facts upon which the petitioner relies as a basis of this proceeding are as follows:

(a) Petitioner and Ellsworth Harrold were married on November 27, 1936. They thereafter resided in California as husband and wife. At the time of their marriage, Ellsworth Harrold had considerable separate property including the business of distribution of Ford automobiles conducted under his name.

(b) During the early part of the year 1945 cer-

tain differences arose between Ellsworth Harrold and petitioner, and proceedings for separate maintenance were commenced by petitioner against Ellsworth Harrold in the Superior Court of the State of California, in and for the County of Sacramento. During the pendency of said proceedings, the petitioner and Ellsworth Harrold entered into an agreement for the purpose of settling their property rights and settling all claims which either may have against the other or the estate of the other. This agreement was dated June 30, 1945, and a copy thereof is attached hereto, and made a part hereof as Exhibit B.

(c) Under the provisions of said agreement Ellsworth Harrold granted to petitioner, among other property, certain shares of stock. (See paragraph 2 of the agreement.) The shares of stock on which the Commissioner seeks to adjust the cost basis to petitioner are among the shares of stock granted to petitioner by Ellsworth Harrold pursuant to that agreement.

(d) The shares of stock granted to petitioner by Ellsworth Harrold pursuant to that agreement were the separate property of Ellsworth Harrold. They were not community property.

(e) The granting by Ellsworth Harrold to petitioner of said shares of stock was not a division of community property.

(f) The granting of said shares by Ellsworth Harrold to petitioner was the consideration for the

release by petitioner of all claims that petitioner had against said Ellsworth Harrold, arising out of the marriage relationship, or otherwise.

(g) As a part of the consideration for the transfer of said stock to petitioner by said Ellsworth Harrold, petitioner agreed to a separation and released Ellsworth Harrold of any and all claims for alimony, permanent maintenance, support, alimony pendente lite, counsel fees, and costs in any domestic litigation; all claims for widow or family allowance against the estate of Ellsworth Harrold; all claims as an heir at law or next of kin; all right to inherit from Ellsworth Harrold; all rights to administrate Ellsworth Harrold's estate or to act as executrix of any will made by him; all rights in all claims to the future earnings of said Ellsworth Harrold; all rights of homestead, and all rights, titles and interests in and to any property thereafter acquired by Ellsworth Harrold, and generally all claims of any kind that petitioner might assert, based upon the marriage of petitioner and said Ellsworth Harrold.

As a further consideration, petitioner agreed to pay all outstanding obligations incurred by her during the marriage relationship and all obligations thereafter incurred by her.

(h) Pursuant to said agreement, petitioner and Ellsworth Harrold lived separate and apart.

(i) Thereafter on or about September 15, 1945, petitioner and said Ellsworth Harrold became reconciled and again lived together as husband and

wife, in the State of California, up to March, 1948, when they again separated.

(j) During the years 1946-47-48 Ellsworth Harrold received, expended and controlled the disposition of the entire salary received by him from the Ellsworth Harrold Company, and the Northern Motor Company. This is the salary, one-half of which the Commissioner has determined to be income to the petitioner for the years 1946-47-48. Petitioner did not receive said income.

(k) For the years 1946 and 1947 Ellsworth Harrold filed a separate return in which he included all of his salary as income and paid the tax thereon. Hence, the government has been paid the tax which it now seeks to collect from petitioner.

1. In April, 1948 petitioner commenced divorce proceedings in the Superior Court of the State of California, in and for the County of Sacramento. In said divorce proceedings in determining the residual community property available for distribution between Ellsworth Harrold and petitioner, the Court charged the community with a pro-rata of the total federal income tax for the years 1946, 1947 and the period January 1, to July 31, 1948. The amount of tax so charged to the petitioner was computed at the surtax rates applicable to Ellsworth Harrold's total income which included both his separate income and personal service earnings, or community income. The basis of the Court's decision in the divorce proceedings was that Ellsworth Harrold had already paid the federal income tax on this community income for the years 1946 and 1947, and



would pay the federal income tax on this community income for the period January 1 to July 31, 1948. Hence, petitioner is not properly charged with the deficiency in respect to this community income, because she has already in effect paid more than the amount due the United States Government for taxes on this income.

(m) There has been no omission from gross income of an amount which is in excess of twenty five percent (25%) of the gross income stated in petitioner's returns for the calendar years 1946 and 1947.

Wherefore petitioner prays that this Court may hear this proceeding and determine:

1. That no part of the salary or earnings of Ellsworth Harrold for the years in question, is taxable to petitioner.

2. That the cost basis of the stocks sold during the years in question is the fair market value when received by petitioner, and not the cost to the community.

3. That the assessments for the years 1946 and 1947 are barred by the statute of limitations.

4. That there is no deficiency due by petitioner for the years 1946, 1947 or 1948, or any of them.

DAVID LIVINGSTON,  
LOUIS F. DiRESTA,

/s/ By DAVID LIVINGSTON,  
Counsel for Petitioner

Duly Verified.

## EXHIBIT A

U. S. Treasury Department, Office of Internal Revenue Agent in Charge, 74 New Montgomery St., San Francisco 5, California.

IRA:90-D:HM

Feb. 21, 1952

Mrs. Ella E. Harrold

1980 Washington St., San Francisco, Calif.

Dear Mrs. Harrold:

You are advised that the determination of your income tax liability for the taxable year(s) ended December 31, 1946 to December 31, 1948, inclusive, discloses a deficiency of \$32,883.63 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days from the date of the mailing of this letter you may file a petition with The Tax Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the deficiency. In counting the 90 days you may not exclude any day unless the 90th day is a Saturday, Sunday, or legal holiday in the District of Columbia, in which event that day is not counted as the 90th day. Otherwise Saturdays, Sundays, and legal holidays are to be counted in computing the 90-day period.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to this office for the attention of IRA:90-D. The signing and filing of this form will expedite the

## Exhibit A—(Continued)

closing of your return(s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after receipt of the form, or on the date of assessment, or on the date of payment, whichever is earlier.

Very truly yours,

**JOHN B. DUNLAP,**

Commissioner

/s/ By F. M. HARLESS,

Internal Revenue Agent in Charge

Enclosures: Statement, Form 1276, Agreement  
Form—HM

## Statement

Tax Liability for the Taxable Years Ended December 31, 1946, December 31, 1947, December 31, 1948.

Year	Deficiency
1946 Income Tax . . . . .	\$17,523.07
1947 Income Tax . . . . .	8,368.90
1948 Income Tax . . . . .	6,991.66
Total . . . . .	<hr/> \$32,883.63

In making this determination of your income tax liability, careful consideration has been given to your protest filed December 11, 1951.

The five year period of limitation for assessment provided in section 275(c) of the Internal Revenue Code is held to be applicable to the taxable years

## Exhibit A—(Continued)

ended December 31, 1946 and December 31, 1947 since there has been an omission from gross income of an amount which is in excess of 25% of the gross income stated in your return.

## ADJUSTMENTS TO NET INCOME

Year: 1946

Net income as disclosed by return.....	\$	7,465.77
Unallowable deductions and additional income:		
(a) Wages .....	\$	6,825.00
(b) Business income .....		22,380.18
(c) Capital gain .....		6,332.21
		<hr/>
Net income as adjusted .....	\$	43,003.16

## EXPLANATION OF ADJUSTMENTS

(a) Income is increased by \$6,825.00 representing your one-half community share of salary received by Ellsworth Harrold, which was not included in your income as reported.

(b) The two organizations owned by Mr. Harrold were incorporated during the year 1946. The income from this source is held to be both separate and community. Allocation is made of the community income, increasing your net income by \$22,380.18 as follows:

Total income for period Jan. 1 to May 31, 1946....\$ 96,258.86

Average investment .....

---

\$249,881.52

Basis for allocation:

    Allowance for salary.....\$ 9,050.00      46.5%

    10% return on investment reduced  
    to five months ..... 10,411.75      53.5%

Total .....\$19,461.75      100%

Community income—46.5% of \$96,258.86.....\$ 44,760.37

Your one-half community share.....\$ 22,380.18

(c) It is held that the cost basis of the stocks sold during the year is the cost to the community, since these stocks were received by you as a division of the community property. Your income is therefore increased by \$6,332.22 due to the adjustment of the cost basis as shown below:

## Exhibit A—(Continued)

	Date Acquired	Date Sold	Sales Price	Cost Basis	Gain
100 shares Allegheny Ludlum .....	6-30-45	3-27-46	\$4,365.41	\$2,246.75	\$ 2,118.66
100 shares Briggs Manufacturing Co. ....	6-30-45	3-27-46	4,801.81	2,913.93	1,887.88
200 shares Congoleum Nairn .....	6-30-45	10-11-46	5,975.88	4,624.87	1,351.01
100 shares McKesson Robbins .....	6-30-45	3-27-46	4,819.19	2,456.69	2,362.50
100 shares Standard Oil of California .....	6-30-45	3-27-46	4,839.21	9,038.70	6,214.37
100 shares Standard Oil of California .....	6-30-45	5-28-46	4,851.68		
100 shares Standard Oil of California .....	6-30-45	10-18-46	5,562.18		
Long-term capital gain realized on sale of stock.....					\$13,934.42
Long-term capital gain recognized—50%.....					\$ 6,967.21
(1) Long-term capital gain recognized on sale of service station .....					7,352.53
Total long-term capital gain.....					\$ 14,319.74
Long-term capital gain reported.....					7,987.52
Increase .....					\$ 6,332.22
(1) The long-term capital gain on the sale of the serv- ice station has been adjusted as follows:					
Sales price .....					\$ 20,000.00
Less: Expense of sale.....					190.83
Net sales price .....					\$ 19,809.17
Cost basis: .....					\$6,922.00
Less depreciation allowable.....					1,817.90
Long-term capital gain realized.....					\$ 14,705.07
Long-term capital gain recognized—50%.....					\$ 7,352.53

## Exhibit A—(Continued)

## COMPUTATION OF ALTERNATIVE TAX

Year: 1946

Net income .....	\$ 43,003.16
Less: Excess of net long-term capital gain over net short-term capital loss .....	9,637.37
Ordinary net income .....	\$ 33,365.79
Less: Exemptions .....	500.00
Normal tax and surtax net income.....	\$32,865.79
Tentative tax .....	\$ 15,022.76
Less 5% of \$15,022.76 .....	751.14
Partial tax .....	\$ 14,271.62
50% of excess of net long-term capital gain over net short-term capital loss .....	4,818.69
Alternative tax .....	\$ 19,090.31

## COMPUTATION OF TAX

Year: 1946

Net income .....	\$ 43,003.16
Less: Exemption .....	500.00
Normal tax and surtax net income.....	\$ 42,503.16
Combined tentative normal tax and surtax.....	\$ 21,467.18
Less: 5% of tentative tax.....	1,073.36
Total tax .....	\$ 20,393.82
Alternative tax .....	\$ 19,090.31
Correct income tax liability.....	\$ 19,090.31
Income tax disclosed by return, page 1, line 7, Original, Account No. 3025319	
First California District .....	1,567.24
Deficiency of income tax.....	\$ 17,523.07

## Exhibit A—(Continued)

## ADJUSTMENTS TO NET INCOME

Year: 1947

Net income as disclosed by return.....	\$	2,731.50
Unallowable deductions and additional income:		
(a) Salary .....	\$14,005.00	
(b) Long-term capital gain.....	6,883.92	
(c) Medical expense .....	638.93	21,527.85
Net income as adjusted.....	\$	24,259.35

## EXPLANATION OF ADJUSTMENTS

- (a) Income is increased by \$14,005.00 representing your one-half community share of salary received by Mr. Ellsworth Harrold, which was not included in income as reported.
- (b) As explained under item (c) for the year 1946, long-term capital gain has been increased by \$6,883.92, due to the adjustment of cost basis to the community property, as follows:

	Date Acquired	Date Sold	Selling Price	Cost Basis	Gain
50 shares Allegheny Ludlum .....	6-30-45	12-24-47	\$1,565.36	*1,123.38	\$ 442.48
100 shares Standard Oil of California .....	6-30-43	9- 2-47	5,861.43	3,012.93	2,848.50
500 shares Standard Oil of California .....			22,996.64	12,051.72	10,944.92
50 shares Allegheny Ludlum .....			2,176.36	1,123.38	1,052.98
Long-term capital gain realized.....					\$15,288.88
Long-term capital gain recognized—50%.....					\$ 7,644.44
Long-term capital gain reported.....					760.52
Increase .....					\$ 6,883.92

- (c) Medical expenses are allowable in excess of 5% of the adjusted gross income. Since the total medical expenses paid do not exceed 5% of the adjusted gross income as corrected the amount claimed of \$638.93 is disallowed.

## Exhibit A—(Continued)

## COMPUTATION OF ALTERNATIVE TAX

Year: 1947

Net income .....	\$24,259.35
Less: Excess of net long-term capital gain over net short-term capital loss.....	6,863.94
Ordinary net income.....	\$17,395.41
Less 1 exemption at \$500.00.....	500.00
Normal tax and surtax net income.....	\$16,895.41
Tentative tax .....	\$5,647.71
Less: 5% .....	282.39
Partial tax .....	\$5,365.32
50% of excess of net long-term capital gain over net short-term capital loss .....	3,431.97
Alternative tax .....	\$8,797.29

## COMPUTATION OF TAX

Year: 1947

Net income .....	\$ 24,259.35
Less: Exemption .....	500.00
Normal tax and surtax net income.....	\$ 23,759.35
Combined tentative normal tax and surtax.....	\$ 9,418.02
Less: 5% of tentative tax .....	470.90
Total tax .....	\$ 8,947.12
Alternative tax .....	\$ 8,797.29
Correct income tax liability.....	\$ 8,797.29
Income tax disclosed by return, page 1, line 7	
Original, Account No. 2000881	
First California District .....	428.39
Deficiency of income tax.....	\$ 8,368.90



## Exhibit A—(Continued)

## ADJUSTMENTS TO NET INCOME

Year: 1948

Net income as disclosed by return.....	\$	4,381.25
Unallowable deductions and additional income:		
(a) Salary .....	\$18,420.00	
(b) Long-term capital gain .....	403.73	18,823.73
Net income as adjusted .....	\$	23,204.98

## EXPLANATION OF ADJUSTMENTS

- (a) Income is increased by \$18,420.00 representing your one-half community share of salary received by Mr. Ellsworth Harold, which was not included in your income as reported.
- (b) Long-term capital gain is increased by \$403.73, computed as follows:
- |  |    |          |
|--|----|----------|
| 100 shares Blake and Decker:               |    |          |
| Cost basis claimed .....                   | \$ | 2,725.00 |
| Cost basis to community.....               |    | 1,917.55 |
| Long-term capital gain realized .....      | \$ | 807.45   |
| Long-term capital gain recognized—50%..... |    | 403.73   |

## COMPUTATION OF INCOME TAX

Year: 1948

Net income .....	\$	23,204.98
Less 1 exemption at \$600.00.....	600.00	
Normal tax and surtax net income.....	\$	22,604.98
Tentative tax .....	\$	8,736.94
Less: 17% on \$400.00.....	\$	68.00
12% on \$8,336.94 .....	1,000.43	1,068.43
Correct income tax liability.....	\$	7,668.51
Income tax disclosed by return		
Original, Account No. 21696926		
First California District.....		676.75
Deficiency in income tax.....	\$	6,991.66

## EXHIBIT B

This Agreement, made this 30th day of June, 1945, between Ellsworth Harrold of Sacramento, California, as First Party, and Ella Elizabeth Harrold of Sacramento, California, as Second Party,

Witnesseth:

That, Whereas, the parties hereto are, and for some time last past have been, husband and wife, but certain differences have arisen between them which render it impossible for them to continue living together; and

Whereas, it is desirable mutually for the parties hereto to settle all of their property rights in the premises and those arising out of the marriage relationship, and to settle all claims which one might have against the other or the estate of the other,

Therefore It Is Agreed:

1. First Party hereby grants to Second Party as her sole and separate property, all of his right, title and interest in and to all of that certain real property situate, lying and being in the City of Sacramento, County of Sacramento, State of California, and known, designated and described as:

All that portion of Section 13, Township 8 North Range 4 East, Mount Diablo Base and Meridian, described as follows:

Beginning at a point on the Southerly line of the property conveyed to the City of Sacramento by deed recorded in the office of the County Recorder of Sacramento County on March 13, 1934, in Book 472 of Official Records, page 31, said point being

## Exhibit B—(Continued)

located on the Westerly line of the 150 feet right of way of the Western Pacific Railroad Company where said right of way changes to 100 feet in width and which point is located South  $77^{\circ} 15'$  West 150 feet from the Southwest corner of West Curtis Oaks Addition, as shown on the official map recorded in the office of the County Recorder of Sacramento County, May 3, 1911, in Book 12 of Maps, Map No. 19; thence from said point of beginning North  $74^{\circ} 29\frac{1}{2}'$  West 80.39 feet along the Southerly line of the property conveyed to the City of Sacramento to a point in the Easterly line of Freeport Boulevard; said point being located South  $70^{\circ} 35\frac{1}{4}'$  East 40.09 feet from a stone monument set by the City Engineer of said City of Sacramento to mark the center line intersection of Freeport Boulevard and Vallejo Way; thence South  $15^{\circ} 30\frac{3}{4}'$  West 120.00 feet along the Easterly line of Freeport Boulevard to the Northwesterly corner of the property conveyed by Ellsworth Harrold and Ella E. Harrold to Dallman Supply Company by deed dated September 14, 1942, recorded September 19, 1942, in Book 967 of Official Records, page 444; thence along the Northerly line of said property South  $72^{\circ} 59'$  East 147.02 feet to a point in the Westerly line of the 150 foot right of way of said Western Pacific Railroad Company, thence North  $12^{\circ} 45'$  West along said right of way line to the point of beginning.

2. First Party hereby grants to Second Party as her sole and separate property, all of his right,

## Exhibit B—(Continued)

title and interest in and to all of the following described personal property, to-wit:

- 200 shares of Allegheny-Ludlum Stock
- 100 shares of Black & Decker stock
- 200 shares of Briggs Manufacturing Co. stock
- 200 shares of Congoleum Nairn stock
- 100 shares of Pacific Lighting Co. stock
- 2000 shares of Yuba Consolidated Gold Fields stock
- 1000 shares of Standard Oil Company of California
- 100 shares of McKessen & Robbins stock
- 1940 Lincoln Sedan, being the automobile previously and now driven and possessed by Second Party.

All community property located at 1050 45th Street, Sacramento, California, and particularly inventoried on the schedule hereunto attached and marked Exhibit "A".

3. Second Party hereby grants to First Party as his sole and separate property, all of her right, title and interest in and to all of that certain real property situate, lying and being in the City of Sacramento, County of Sacramento, State of California, and known, designated and described as:

Parcel 1: The South 60 feet and the North 100 feet of Lot 4, in the block bounded by "V" and "W", Twenty-first and Twenty-second Streets of the City of Sacramento, according to the official map or plan of said city.

Parcel 2: Lot 4, in the block bounded by "R" and "S" Fourth and Fifth Streets of the City of

## Exhibit B—(Continued)

Sacramento, according to the official map or plan of said city.

Parcel 3: The North  $\frac{3}{4}$  of the West 56 feet and all of the East 24 feet of Lot 2; West  $\frac{1}{2}$  of Lot 3 in the block bounded by "F" and "G", Eleventh and Twelfth Streets of the City of Sacramento, according to the official map or plan of said city.

Parcel 4: Lots 7 and 8, in the block bounded by "J" and "K", Twenty-first and Twenty-second Streets of the City of Sacramento, according to the official map or plan of said city.

Parcel 5: The South 30 feet of Lot 1904, and the North 60 feet of Lot 1905 of Wright & Kimbrough Tract No. 24, as shown on the official plat of Wright & Kimbrough Tract, recorded in the office of the County Recorder of Sacramento County on July 24, 1913, in book 14 of Maps, Map No. 37, in the City of Sacramento, County of Sacramento, State of California.

Parcel 6: Lots 7305, 7314, 7315, 7316, 7317, 7318, 7319, 7320, as shown on the official "Plat of Casa Alameda Tract", recorded in the office of the County Recorder of said Sacramento County, May 4, 1906, in Book 7 of Maps, Map No. 6, and a strip of land designated as an "alley" lying contiguously along the west line of Lots 7313, 7314, 7315 and 7316, and the east line of Lots 7317, 7318, 7319 and 7320 as shown on the official "Plat of Casa Alameda Tract", described as:

Beginning at the southwest corner of Lot 7316 thence northerly along the west line of Lots 7316,

## Exhibit B—(Continued)

7315, 7314 and 7313 to the northwest corner of Lot 7314; thence westerly 20 feet to the northeasterly corner of Lot 7317; thence southerly along the easterly line of Lots 7317, 7318, 7319 and 7320 to the southeast corner of Lot 7320; thence easterly 20 feet to the point of beginning.

Saving and Excepting that portion of Lots 7315 and 7316 of said subdivision described as follows: Beginning at the southwest corner of said Lot 7316; thence northerly along the westerly line of said Lots 7316 and 7315 a distance of 80.07 feet; thence easterly parallel with the southerly line of said Lot 7316 a distance of 70.10 feet; thence southerly parallel with the west line of said Lots 7315 and 7316 a distance of 80.07 feet to the southerly line of said Lot 7316; thence westerly along the southerly line of said Lot 7316 a distance of 70.10 feet to the point of beginning.

4. Second Party hereby grants to First Party, as his sole and separate property, all of her right, title and interest in and to the business operated by First Party under the name of "Ellsworth Harrold" and under the name "Northern Motor Co.", in the City of Sacramento, California, including real estate, leases, good will, accounts receivable, inventories, machinery, automobiles, fixtures, equipment, and all other assets thereof.

5. With the exception of the items specifically described in paragraphs 1 and 2 of this agreement, Second Party hereby waives and releases all rights,

## Exhibit B—(Continued)

titles and interest that she may have in any asset now owned or controlled by First Party, whether described in this agreement or not, including but not confined to real estate within or without the State of California, life insurance policies, bank accounts, stocks, bonds, furnishings, accounts and earnings to the date hereof.

6. First Party shall execute and deliver to Second Party a deed of conveyance to the real property herein set aside to her, the registration certificate for the Lincoln automobile, and proper transfers of all of the stocks heretofore set aside to Second Party. Revenue stamps shall be provided by First Party. Second Party shall execute and deliver to First Party a quit-claim deed covering the six (6) parcels of real estate described in paragraph No. 3 of this agreement, and she shall execute and deliver acquittances of all outstanding policies of life insurance upon the life of First Party.

The parties shall, at any time or times hereafter, make, execute and deliver any and all such further or other instruments, papers, or things as the other of the said parties shall require for the purpose of giving full effect to these presents and to the covenants, provisions and agreements hereof.

7. First Party shall bear all claims and demands which have been assessed against him in connection with the operation of his business by the War Labor Board and the Office of Price Administration of the United States, and shall hold Second Party and

## Exhibit B—(Continued)

any property hereby set aside to her free and clear therefrom.

8. First Party will bear and pay all taxes upon the community income earned and realized up to the date of this agreement, and he shall be entitled to any and all credits and refunds for prepayment or overpayment. Each party shall bear and pay all taxes upon the separate income of each and all income hereafter realized by Second Party from any of the items specifically described in paragraphs 1 and 2 of this agreement shall be her separate property, and all taxes thereon shall be borne and paid by her. In connection herewith it is agreed that the firm of Barton, Nathanson & Barton shall be employed by each of the parties hereto for the purpose of preparing their respective 1945 State and Federal Income Tax Returns and that First Party shall report to that firm the portion of earnings from January 1, 1945 up to the date of this agreement which are allocable to the community, to the end that one-half ( $\frac{1}{2}$ ) thereof may be reported upon the separate return of First Party, and Second Party will report to the same firm her individual earnings and exemptions and pay such portion of her State and Federal income taxes as would have been paid had there not been added thereto her allocable portion of the community earnings from January 1, 1945, to the date of this agreement, while First Party shall pay the additional State and Federal income taxes chargeable to her by reason of the inclusion in her separate return



## Exhibit B—(Continued)

of her allocable portion of the said community earnings from January 1, 1945 to the date of this agreement. Against said payment by First Party there shall be given full credit for all 1945 estimated income tax installments which heretofore have been made or hereafter may be made.

9. Each party shall pay and discharge his respective attorney's fees in the action now pending between them for separate maintenance, provided, however, that First Party is not entitled to reimbursement for fees or expenses previously paid, and likewise any action for divorce.

10. It shall be lawful for each of the parties hereto at all times hereafter to live separate and apart from the other, and free from all marital control or authority as though each was sole and unmarried.

Neither of the parties shall molest or annoy the other, or compel or endeavor to compel the other to cohabit or to dwell with him or her, as the case may be, by any legal or other proceedings for restoration of conjugal rights or otherwise.

11. Second Party shall and does hereby waive, release and relinquish unto First Party any and all claims that she may now or hereafter have against him for alimony; alimony pendente lite; permanent maintenance; support; counsel fees in the action now pending, or which may be instituted hereafter between said parties based upon the marital status or involving the same or any right incidental thereto; costs of suit in any of such action or actions,

## Exhibit B—(Continued)

except as hereinabove provided; all claims for widow or family allowance against the estate of First Party if deceased; all claims as heir at law or next of kin, or as legatee or devisee in any will; all right to inherit from First Party; any right to administer First Party's estate, or to act as executrix of any will executed by First Party; all rights in, or claims to the future earnings of First Party; all rights of homestead; all rights to claim any probate homestead; all rights, titles, and interests in or to any property, real, personal or mixed, hereafter acquired by First Party; and generally all claims of whatever description that Second Party might assert based upon the marriage of the parties hereto.

12. First Party does hereby waive and relinquish unto Second Party all of his claims against her, her property and her estate, including all and singular those enumerated in paragraph 11 above, all waivers in said paragraph being intended by said parties to be mutual and reciprocal.

13. Second Party shall pay all outstanding obligations heretofore incurred by her and all obligations hereafter incurred by her and she shall save First Party safe and harmless therefrom. Conversely, First Party shall pay all outstanding obligations heretofore incurred by him and all obligations hereafter incurred by him, and he shall save Second Party safe and harmless therefrom.

In Witness Whereof, the parties hereto have here-

Exhibit B—(Continued)

unto set their hands and seals the day and year first above written.

[Seal]                      ELLSWORTH HARROLD,  
First Party

[Seal]                      ELLA ELIZABETH HARROLD  
Second Party

State of California,  
County of Sacramento—ss.

On this 30th day of June, in the year one thousand nine hundred and forty-five, before me, Marion Fritz, a Notary Public in and for the County of Sacramento, personally appeared Ellsworth Harold known to me to be the person whose name is subscribed to the within instrument, and he duly acknowledged to me that he executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official Seal the day and year in this certificate first above written.

[Seal]                      MARION FRITZ,  
Notary Public in and for the County of Sacramento, State of California.

State of California,  
County of Sacramento—ss.

On this 30th day of June, in the year one thousand nine hundred and forty-five, before me, Ralph H. Lewis, a Notary Public in and for the County of Sacramento, personally appeared Ella Elizabeth

## Exhibit B—(Continued)

Harrold known to me to be the person whose name is subscribed to the within instrument, and she duly acknowledged to me that she executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my Official Seal the day and year in this certificate first above written.

[Seal]                      RALPH H. LEWIS,  
Notary Public in and for the County of Sacra-  
mento, State of California.

[Endorsed]: T.C.U.S. Filed May 14, 1952.

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[Title of Tax Court and Cause.]

## ANSWER

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, Charles W. Davis, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed by the above petitioner, admits, denies and alleges as follows:

1 to 3, inclusive. Admits the allegations contained in paragraphs 1 to 3, inclusive, of the petition.

4, to g, inclusive. Denies the allegations of error contained in paragraph 4, a to g, inclusive, of the petition.

5, a. Denies for lack of information the allegations contained in paragraph 5, a of the petition.

b. Admits that during the year 1945 proceedings for separate maintenance were commenced by petitioner against Ellsworth Harrold in the Superior Court of the State of California, in and for the County of Sacramento; admits that during the pendency of said proceedings, the petitioner and Ellsworth Harrold entered into an agreement; admits that this agreement was dated June 30, 1945, and a copy thereof is attached to the petition as Exhibit B; denies for lack of information the remaining allegations contained in paragraph 5, b of the petition.

c. Denies for lack of information the allegations contained in paragraph 5, c of the petition.

d to g, inclusive. Denies the allegations contained in paragraph 5, d to g, inclusive, of the petition.

h to l, inclusive. Denies for lack of information the allegations contained in paragraph 5, h to l, inclusive, of the petition.

m. Denies the allegations contained in paragraph 5, m of the petition.

6. Denies generally and specifically each and every allegation in the petition not hereinbefore admitted, qualified or denied.

7. Further answering, respondent alleges that on the Federal income tax return filed by the petitioner for each of the calendar years 1946 and 1947 the petitioner omitted from gross income an amount properly includible therein which was in excess of 25 per centum of the amount of gross income stated in the return for each of said years, and by reason thereof the provisions of section 275(c) of the In-

ternal Revenue Code are applicable in determining the period of limitations upon assessment and collection.

8. The facts upon which respondent relies in support of the allegations in paragraph 7, *supra*, are as follows:

(a) On the Federal income tax return filed by the petitioner for the calendar year 1946 the petitioner stated gross income in the amount of \$8,465.15. Petitioner's gross income for said year was in fact not less than \$43,003.16.

(b) On the Federal income tax return filed by the petitioner for the calendar year 1947 the petitioner stated gross income in the amount of \$4,121.49. Petitioner's gross income for said year was in fact not less than \$24,259.35.

Wherefore, it is prayed that the Commissioner's determination be approved and the petitioner's appeal denied.

/s/ CHARLES W. DAVIS,  
Chief Counsel, Bureau of  
Internal Revenue

Of Counsel:

B. H. Neblett, District Counsel

T. M. Mather, Charles W. Nyquist, Special Attorneys, Bureau of Internal Revenue.

[Endorsed]: T.C.U.S. Filed July 15, 1952.

[Title of Tax Court and Cause.]

## STIPULATION OF FACTS

(a) It is hereby stipulated and agreed that the issues raised by petitioner in the assignments of error contained in subparagraphs 4b, 4c, and 4d of the petition with respect to petitioner's cost basis and gain on the sale of certain capital assets shall be disposed of by including in income for each of the taxable years in controversy total net long term capital gains recognized in the amounts set forth in the last column, *infra*.

Year	As reported on returns	As determined in deficiency notice	As hereby stipulated
1946	\$7,987.52	\$14,314.74	\$11,153.66
1947	760.62	7,644.44	5,794.17
1948	None	403.73	333.96

(b) The petitioner hereby abandons the issue relating to the statute of limitations raised in the assignments of error contained in subparagraphs 4f and 4g of the petition.

(c) The remaining issue is whether one-half of the salary received by Ellsworth Harrold during the years before the Court is taxable to the petitioner as her community share of said income. It is mutually agreed, by and between the parties hereto, by their respective counsel, that this issue shall be submitted to the Court for decision on the following facts, which are hereby stipulated to be true:

1. The petitioner is an individual residing at 1980 Washington Street, San Francisco, California. Her returns for the periods here involved were filed

with the Collector for the First District of California.

2. Petitioner and Ellsworth Harrold were married on November 27, 1936. They thereafter resided in California as husband and wife.

3. During the early part of the year 1945 certain differences arose between Ellsworth Harrold and petitioner and proceedings for separate maintenance were commenced by petitioner against Ellsworth Harrold. During the pendency of said proceedings, the petitioner and Ellsworth Harrold entered into a property settlement agreement dated June 30, 1945. A copy of said agreement is attached to the petition as Exhibit B thereof.

4. Thereafter on or about September 15, 1945, petitioner and said Ellsworth Harrold became reconciled and again lived together as husband and wife in the State of California.

5. The petitioner and Ellsworth Harrold filed separate individual federal income tax returns for the calendar years 1946, 1947 and 1948.

6. Mr. Harrold was the owner of two business enterprises and in 1946 he procured them to be separately incorporated and the shares of stock thereof issued to him.

7. The net income of said businesses, up to the time of incorporation, and the salary received thereafter from the corporations by Mr. Harrold, were reported by him as his separate income, in the federal and state returns filed by him during the years



1946, 1947 and 1948. Mr. Harrold paid taxes on the income so received by him together with income received by him from various other sources.

In the returns filed by the petitioner, none of said income or salary was reported.

8. A second separation occurred on or about March 25, 1948, and a suit for divorce was instituted by the petitioner. An interlocutory decree of divorce was handed down by the Superior Court of the State of California, in and for the County of Sacramento, on February 15, 1949.

9. In said divorce proceeding, the Superior Court of the State of California confirmed the property settlement agreement dated June 30, 1945, insofar as it effected transfers of property owned by the parties at that time, and said Court further determined that the income from the personal services of Ellsworth Harrold subsequent to September 15, 1945 (the date of the reconciliation) was community property. The decree in the divorce action determined to be community property a portion of the net income of said businesses prior to incorporation as aforesaid, and all the salary received by Mr. Harrold as aforesaid. There were deducted from said community property various items including living expenses and the amount of income taxes, federal and state, paid by Mr. Harrold on the basis of his said returns. After the deduction thereof, the Court ordered equal division of the residual property between petitioner and Mr. Harrold, awarding them each \$867.12.

10. Subsequent to the entry of said decree, Mr. Harrold filed with the Internal Revenue Bureau amended income tax returns for 1946, 1947 and 1948. In said returns he reported one-half of his salary received after incorporation and one-half of the portion of the income prior to incorporation which was attributable to his personal services. He also filed claims for refund of a portion of the federal income taxes paid by him for said years 1946, 1947 and 1948, based on the theory that he had erroneously overstated his income for said years by including in his return Mrs. Harrold's community share of said income from said businesses. Thereafter and during the course of the consideration of the claim for refund, the Commissioner determined that the remaining one-half thereof should be added to the income reported in Mrs. Harrold's returns for 1946, 1947 and 1948.

Allowance of said claims for refund filed by Mr. Harrold would result in overpayments of the taxes paid by him for the years 1946, 1947 and 1948 in an amount in excess of the total of the deficiencies asserted against the petitioner for the same period.

/s/ DAVID LIVINGSTON,  
Counsel for Petitioner

/s/ KENNETH W. GEMMILL,  
Acting Chief Counsel, Bureau of  
Internal Revenue  
Counsel for Respondent

[Endorsed]: T.C.U.S. Filed Nov. 2, 1953.

[Title of Tax Court and Cause.]

## OPINION

Filed June 22, 1954.

Petitioner and her former husband, residents of California, reported only their separate incomes on their individual returns for 1946, 1947, and 1948, although they were married and living together during these years. The Superior Court of California determined, during divorce proceedings, that a portion of her former husband's income for these years was community property. Petitioner was awarded one-half of such community property after the deduction of various items, including living expenses and the amount of Federal and State income taxes, paid by her former husband. Respondent determined deficiencies in petitioner's income taxes for these years because of her failure to include such community income in her returns. Petitioner's former husband filed a claim for refund based on the erroneous inclusion of his former wife's share of community income in his returns.

Held, petitioner is liable for the payment of taxes on her share of community income, and the respondent cannot be required to apply an overpayment by her former husband to petitioner's deficiencies.

David Livingston, Esq., for the petitioner.

Charles W. Nyquist, Esq., for the respondent.

## Opinion

Rice, Judge: This proceeding involves deficiencies in income tax determined against Ella E. Harrold (hereinafter referred to as petitioner) as follows:

Year	Deficiency
1946 .....	\$17,523.07
1947 .....	8,368.90
1948 .....	6,991.66

The sole issue to be decided is whether respondent erred in charging petitioner with one-half of the community income received by her former husband in 1946, 1947, and 1948, although her former husband reported the total of such income on his returns for these years and paid taxes thereon.

The parties have reached agreement on various other issues raised in the pleadings, and such agreement will be taken into account under a Rule 50 computation.

All of the facts were stipulated, are so found, and are incorporated herein by this reference.

Petitioner is an individual residing in San Francisco, California. Her returns for the years here involved were filed with the collector of internal revenue for the first district of California.

Petitioner and Ellsworth Harrold (hereinafter referred to as Harrold) were married in 1936, and thereafter resided in California as husband and wife. During 1945 certain differences arose between petitioner and Harrold, and she commenced an action for separate maintenance. During the pendency of said proceedings, petitioner and Harrold entered

into a property-settlement agreement dated June 30, 1945. However, on or about September 15, 1945, they became reconciled and again lived together as husband and wife in the State of California.

The petitioner and Harrold filed separate, individual, Federal income tax returns for the calendar years 1946, 1947, and 1948. Harrold was the owner of two business enterprises. In 1946 he caused them to be separately incorporated, and the shares of stock thereof issued to him. He reported the net income of said businesses, up to the time of incorporation, and the salary received thereafter from the corporations as his separate income on his returns for 1946, 1947, and 1948. He paid taxes on the income so received together with income received by him from various other sources.

In the returns filed by the petitioner for these years, none of said income or salary was reported.

A second separation occurred during March 1948, and a suit for divorce was instituted by petitioner. On February 15, 1949, an interlocutory decree of divorce was handed down by the Superior Court of the State of California, in and for the County of Sacramento. In said divorce proceeding, the Superior Court confirmed the property-settlement agreement dated June 30, 1945, insofar as it effected transfers of property owned by petitioner and Harrold at that time.

The Superior Court further determined that the income attributable to the personal services of Harrold subsequent to September 15, 1945 (the date of the reconciliation), was community property. An ad-

judication was accordingly made that a portion of the net income of his two business enterprises prior to their incorporation, and the entire salary received by him after the incorporation constituted community property.

In determining the residual amounts of such community property to be divided between petitioner and Harrold, the Superior Court deducted from and charged the community property with various items, including living expenses and the amount of Federal and State income taxes paid by Harrold. After such deductions were made, the balance amounted to \$1,734.24. One-half of this amount was awarded to petitioner as her share of the residual community property.

After the entry of the divorce decree, Harrold filed amended income tax returns for 1946, 1947, and 1948. In said returns he reported one-half of the portion of the business income, prior to incorporation, which was attributable to his personal services and one-half the salary he received after incorporation. He also filed claims for refund of a portion of the Federal income taxes paid by him for these three years, based on the theory that he had erroneously overstated his income for said years by including in his returns petitioner's community share of the income from said businesses.

During the course of the consideration of this claim for refund, the Commissioner determined that one-half of the community income during 1946, 1947, and 1948 should be added to the income reported in petitioner's returns for these years.

Allowance of the claim for refund filed by petitioner's former husband would result in overpayments for the years 1946, 1947, and 1948 in an amount in excess of the total of the deficiencies asserted against the petitioner for the same period.

Petitioner argues that, despite the decree of the Superior Court of the State of California that the income of her former husband attributable to his personal services was community property, no part of such income is now taxable to her. Her theory is that the entire tax on this income has already been paid by her former husband, the manager of the community, out of community funds. She suggests that any overpayment in his taxes, for the years in issue, resulting from the mistaken inclusion in his returns of his wife's share of such community income, be used as a set-off against her deficiencies arising out of her failure to report such community income.

Petitioner is clearly liable, under the operation of the community property laws of California, for taxes on her half of the community income earned by her former husband during the years in issue. As we stated in *Marjorie Hunt*, 22 T. C. —, filed April 30, 1954:

\* \* \* This liability is fixed and definite. It is not a means of splitting income which may be voluntarily chosen or elected to minimize taxes. The wife may not, at her option, return one-half of the community income; she must do so. See *Paul Cavanagh*, 42 B.T.A. 1037 (1940), *affd.* on another issue 125 F.2d 366 (C.A. 9, 1942). \* \* \*

Petitioner refers us to two unreported cases which hold that in the community-property State of California, when a husband has been adjudicated bankrupt, the Commissioner of Internal Revenue may assert the priority of his claim for taxes of the wife against the bankrupt estate which is composed solely of community property. In *The Matter of George Rogers*, U.S.D.C., S.D. Calif., October 18, 1951; In *The Matter of Richard Ryan*, U.S.D.C., S.D. Calif., December 13, 1949. Petitioner relies on dictum in these cases to the effect that a husband, as manager of the community, is personally liable for taxes on his wife's share of community income. This contention is not supported by any citations of authority either in the cases or by petitioner. It is contrary to a line of cases in which we, and other courts, have held that the powers of management conferred upon the husband by community-property laws do not render him personally liable for taxes on his wife's share of the community income. *Poe vs. Seaborn*, 282 U.S. 101 (1930); *Paul Cavanagh*, 42 B.T.A. 1037 (1940), *affd.* on another issue 125 F.2d 366 (C.A. 9, 1942); *Herbert Marshall*, 41 B.T.A. 1064 (1940). The following explanation given by this tribunal in the *Cavanagh* case, pages 1043 and 1044, adequately answers petitioner's contention:

The fact that under the California law the husband has a broad power of control does not detract from the wife's interest. This power is conferred upon him merely as the agent of the community and does not make him the owner of all the com-



munity property and income, nor negative the wife's present interest there as equal coowner. \* \* \*

\* \* \* \* \*

\* \* \* Clearly, therefore, the petitioner's wife is taxable on one-half of the community income. She is the owner thereof, although not entitled to present possession. \* \* \*

Petitioner argues that her former husband paid taxes on her share of the community income in issue out of community property and, in effect, that any overpayment and resulting refund is community property. She, therefore, urges that the respondent must satisfy her deficiencies out of such "community property". There is no evidence that the overpayment by her former husband was made out of community property. In any event, we need not determine whether it was, or whether the subsequent dissolution of the community and distribution of its property by court decree requires that any refund now due him be treated as his separate, personal property. The decisive factor is that the wife, in a community-property state, is liable for taxes on her share of community income, and she cannot require the Commissioner to assert a claim for such taxes against community property rather than against her personally.

Nor do we agree with petitioner's contention that her former husband's overpayment should now be applied as a set-off to her deficiencies. Petitioner and her former husband each filed individual returns for each of the years here in issue. He paid only what he believed to be the taxes due on his

income. When he discovered an overpayment to have been made, he requested that it be refunded. Even were he joined in this action, we could not direct that his overpayment be used to satisfy his former wife's tax liabilities. We have repeatedly held that each spouse is a separate and distinct taxpayer, and that we cannot require the Commissioner to credit one with a refund due the other. *Irma Jones Hunt*, 47 B.T.A. 829 (1942); *Robert C. Roebeling*, 28 B.T.A. 644, 656 (1933), reversed on other grounds 78 F.2d 444 (C.A. 3, 1935); *H. B. Perine, et al.*, 22 B.T.A. 201 (1931); *Alexander Vayssie*, 8 B.T.A. 587 (1927). Petitioner cites *John W. Preston*, 21 B.T.A. 840 (1930), wherein we might appear to have made an exception to that rule. However, in that case, the two spouses were still married and living together; and we stated that it "would therefore seem proper that the husband should be allowed credit for the total amount of tax paid on the community income returned by both spouses, to the extent that such payment has not been refunded or otherwise credited". We subsequently emphasized in *H. B. Perine et al.*, *supra*, that we could not require the respondent to do so, stating in part:

\* \* \* The spouses became separate and distinct taxpayers under the statute upon the filing of separate returns of the community income, and the situation is no different than it would be if the taxpayers were other than husband and wife. They being separate taxpayers, we lack authority to require the respondent to credit the proposed de-

iciency determined against the wife with an overpayment of tax by the husband. *Alexander Vayssie*, 8 B.T.A. 587. Cf. *John W. Preston*, 21 B.T.A. 840.

We do not consider ourselves bound by any language to the contrary as expressed by a concurring opinion in *Corinne Griffith Marshall vs. U. S.* 88 Ct. Cl. 393, 26 F.Supp. 474 (1939).

Although it may be possible that a "taxpayer may voluntarily agree to have a refund due him used in satisfaction of a tax due from another taxpayer", *Klotz vs. U. S.*, 80 Ct. Cl. 514, 9 F.Supp. 618 (1935), such is not the case here. Petitioner's former husband has clearly indicated by the individual returns originally filed, his amended returns, and his request for refund that his intention is to pay taxes due only on his share of the community income.

We recognize that there is a strong, equitable consideration here in petitioner's favor. In arriving at a division of community property, the Superior Court of California charged petitioner's share with the Federal income taxes previously paid by her former husband. But although he may now recover a refund of an amount previously credited to him in the divorce settlement, we cannot presume to adjust possible inequities therein. Any adjustment in the property-settlement decree is beyond our jurisdiction, and we cannot direct what is to be done with his refund. Petitioner cites *Clayton vs. U. S.*, 70 Ct. Cl. 740, 44 F.2d 427 (1930), certiorari denied 283 U.S. 860 (1931), and *Lattimore et al., vs. U. S.*, 82 Ct. Cl. 97, 12 F.Supp. 895 (1935), as supporting the allocation of an overpayment by one spouse to

a deficiency of the other. However, in each of these cases, the overpayment resulted from a joint return of both spouses, thus clearly indicating that the amount originally paid with the joint return was meant to apply to the tax liabilities of each.

Decision will be entered under Rule 50.

Served June 22, 1954.

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[Title of Tax Court and Cause.]

REQUEST FOR LEAVE TO FILE MOTION  
FOR FURTHER HEARING TO PRESENT  
ADDITIONAL EVIDENCE AND FOR RE-  
CONSIDERATION

Petitioner hereby requests leave to file the attached Motion for Further Hearing to Present Additional Evidence and for Reconsideration.

Dated: December 3, 1954.

/s/ DAVID LIVINGSTON,  
Attorney for Petitioner

[Endorsed]: Granted December 9, 1954. Signed  
Stephen E. Rice, Judge.

[Endorsed]: T.C.U.S. Filed December 7, 1954.

[Title of Tax Court and Cause.]

MOTION FOR FURTHER HEARING TO  
PRESENT ADDITIONAL EVIDENCE AND  
FOR RECONSIDERATION

Petitioner hereby moves the court for a further hearing to present additional evidence and for reconsideration on the basis of said additional evidence.

The evidence to be presented is the opinion of the District Court of Appeal, State of California, Third Appellate District, rendered in the matter entitled "Ella E. Harrold, Plaintiff and Appellant, vs. Ellsworth Harrold, Defendant and Respondent", and numbered 3 Civil No. 8351 in the files of said District Court of Appeal.

A copy of said opinion is attached hereto and made a part hereof.

Said motion is based on the following grounds:

1. That said opinion of the District Court of Appeal was filed on September 28, 1954, after the opinion of the Tax Court in this cause; that the decision of said District Court of Appeal did not become final until the expiration of 60 days from said September 28, 1954, viz: November 27, 1954. Petitioner did not request leave to present to this Court said opinion and decision prior to the time that it became final for the reason that petitioner filed a petition with the Supreme Court of the

State of California for a hearing of said matter and said petition was not denied until November 24, 1954.

2. That said opinion and decision are material to the issues before the Tax Court for all the reasons set forth in the affidavit of David Livingston attached hereto and made a part hereof.

3. Upon all the other grounds set forth in the affidavit of David Livingston attached hereto.

Dated: December 3, 1954.

/s/ DAVID LIVINGSTON,  
Attorney for Petitioner

### AFFIDAVIT OF DAVID LIVINGSTON

State of California,  
City and County of San Francisco—ss.

David Livingston, being first duly sworn, deposes and says:

1. I am one of the attorneys for the petitioner herein.

2. The opinion of The Tax Court was filed herein on June 22, 1954.

3. Theretofore Mrs. Harrold, the petitioner herein, had commenced an action against Harrold numbered 88995 in the Superior Court of the State of California in and for the County of Sacramento, in which she sought various relief including a declaration of her rights with respect to income taxes

paid by Mr. Harrold on his community earnings for the years 1946, 1947 and part of the year 1948.

In her complaint for said declaratory relief petitioner alleged that the interlocutory decree of divorce entered by said Sacramento court in the divorce proceeding between Mr. and Mrs. Harrold determined the residual property existing as of July 31, 1948, and available for division between the parties; that in this determination deductions were made on account of the state and federal income taxes paid by Harrold on his entire earnings for the years 1946, 1947 and part of 1948; that the amount so deducted was \$61,164.10; that the residual community property after such deductions was determined to be \$1,734.24; that subsequent to the interlocutory decree Harrold filed amended income tax returns reporting only one-half of his earnings on the theory that they were community property and the other one-half was taxable to Mrs. Harrold; that he filed claims for refunds on this basis; that as a result thereof the taxing agencies were about to levy deficiencies against Mrs. Harrold; that Harrold would receive a substantial amount as refunds from the taxing agencies and that Harrold would be subjected to a heavy additional income tax burden.

4. In said action Harrold filed a demurrer and a motion to dismiss. The trial court granted the motion to dismiss without prejudice and judgment of dismissal without prejudice was entered. Petitioner appealed from said judgment.

On September 28, 1954, the District Court of Appeal filed an opinion affirming the judgment of the trial court.

Thereafter Mrs. Harrold filed a petition for a hearing by the Supreme Court of the State of California. The Supreme Court denied this petition for hearing on November 24, 1954 and the decision of the District Court of Appeal became final on November 27, 1954.

Attached hereto and made a part hereof is a copy of the opinion and decision of the District Court of Appeal.

\* \* \* \* \*

[Note: The District Court Opinion appears in the official advance sheets of the District Court of Appeal in Vol. 127 Advance California Appellate Reports at pages 725-728.]

/s/ DAVID LIVINGSTON

Subscribed and sworn to before me this 3rd day of December, 1954.

[Seal]        /s/ HALLIE KELLER,  
Notary Public in and for the City and County of  
San Francisco, State of California.

[Endorsed]: T.C.U.S. Filed December 9, 1954.

[Endorsed]: T.C.U.S. Denied December 9, 1954.  
Signed Stephen S. Rice, Judge.



The Tax Court of the United States  
Washington

Docket No. 40953

ELLA E. HARROLD,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

## DECISION

Pursuant to the determination of the Court, as set forth in its Opinion filed June 22, 1954, the respondent filed a computation for entry of decision on October 22, 1954. The petitioner filed objections thereto and an alternative computation on November 26, 1954. The computations for settlement under Rule 50 came on for hearing on December 1, 1954, at which time it was ordered that decision be entered in accordance with respondent's computation. Therefore, it is

Ordered and Decided: That there are deficiencies in income tax for the taxable years and in the respective amounts as follows:

Year	Deficiency
1946 .....	\$14,718.03
1947 .....	4,972.02
1948 .....	6,886.84

[Seal]            /s/ STEPHEN E. RICE,  
                    Judge

Entered: December 20, 1954.

[Title of of Tax Court and Cause.]

## PETITION FOR REVIEW

To the Honorable Judges of the United States  
Court of Appeals for the Ninth Circuit:

1. Ella E. Harrold, of the City and County of San Francisco, State of California, represents that on December 20, 1954, the United States Tax Court rendered a decision that there are deficiencies in income taxes of your petitioner as follows: For the year 1946, \$14,718.03; for the year 1947, \$4,972.02; and for the year 1948, \$6,886.84; and petitioner asks a review of said decision by this Court.

2. Petitioner further represents that she is a citizen of the United States and an inhabitant of the City and County of San Francisco, State of California; that her returns for Federal income tax purposes for the taxable years 1946, 1947 and 1948 were made to the Collector of Internal Revenue for the First District of California, which is within the jurisdiction of the United States Court of Appeals for the Ninth Circuit.

3. The nature of the controversy is as follows:

Petitioner and her former husband, Ellsworth Harrold, residents of California, filed individual returns for the years 1946, 1947 and 1948.

During said years petitioner and Mr. Harrold were married and lived together until on or about March 25, 1948, when they separated and a suit for divorce was filed by petitioner in the Superior

Court of the State of California in and for the County of Sacramento.

Prior to 1946 Mr. Harrold owned two (2) business enterprises which were his separate property. In 1946 he procured them to be separately incorporated and the shares of stock thereof were issued to him. The net income of said businesses up to the time of the incorporation and the salary received thereafter from the corporations were reported by Mr. Harrold as his separate income in his Federal income tax returns during the years 1946, 1947 and 1948. Mr. Harrold paid the taxes on this income, together with income received by him from various other sources. None of said income or salary was reported as income by the petitioner in the returns filed by her.

In the divorce action the Superior Court determined the amount of income attributable to Mr. Harrold's personal services during the years 1946, 1947 and 1948, and held that this was community property. The court then proceeded to compute the amount of community property on the basis of Harrold's earnings less living expenses. The balance was \$62,898.34. Then the court allotted to Mr. Harrold \$61,164.10 on account of income taxes which he had paid during the years above mentioned. The result was that the community property was virtually exhausted. Mrs. Harrold was awarded \$867.12, one-half of the remainder.

The interlocutory decree of divorce embodying such award was entered by the Sacramento Superior Court on February 15, 1949.

Subsequent to the entry of the decree Mr. Harrold filed with the Internal Revenue Bureau amended income tax returns for 1946, 1947 and 1948. In said returns he reported only one-half of the salary and income which was attributable to his personal services.

He also filed claims for refund of a portion of the taxes paid for said years based on the theory that he overstated his income by including in his original returns Mrs. Harrold's community share thereof.

As the result of Mr. Harrold's claims for refund the Commissioner re-opened Mrs. Harrold's tax returns and determined that the remaining one-half of Harrold's income should be added to the income reported by Mrs. Harrold for the years 1946, 1947 and 1948. The Commissioner levied deficiencies accordingly. The Tax Court has upheld the deficiencies.

The amount of the refunds which would be payable to Harrold on the basis of his amended returns substantially exceeds the amount of the deficiencies assessed against Mrs. Harrold for the period involved.

While the matter was pending in the Bureau of Internal Revenue Mrs. Harrold commenced an action in the Sacramento Superior Court for relief against the consequences of Harrold's change of position. She prayed in the alternative (1) that by reason of Harrold's change of position Mrs. Har-

rold was entitled to a redetermination of the amount of the residue of the community property, or (2) that the court make a declaratory judgment to the effect that when refunds were collected by Harrold, Mrs. Harrold would be entitled to participate on some equitable basis that would include the satisfaction of the deficiencies assessed against her.

The complaint was dismissed by the Superior Court.

Mrs. Harrold appealed to the District Court of Appeal of California. The judgment of dismissal was affirmed. The opinion of the District Court of Appeal states that Mrs. Harrold's claim is barred by the principle of *res judicata* and that the events which occurred after the divorce decree did not affect the operation of the rule (*Harrold vs. Harrold*, 127 A.C.A. 725; 274 P.2d 183.)

Thereafter, a petition for hearing by the Supreme Court of California was filed and denied.

Petitioner contends that the Commissioner erred in charging her with one-half of the community income received by Mr. Harrold during 1946, 1947 and 1948, because the entire tax on this income has already been paid by Mr. Harrold as the manager of the community out of community funds and has been charged against community funds.

Petitioner further contends that in determining the deficiency to be assessed and paid by petitioner for 1948 the Commissioner erred in not allowing credit to petitioner for one-half the income tax

withheld from Mr. Harrold's salary during the year 1948.

4. As a basis for review, petitioner makes the following assignments of error:

(a) The Tax Court erred in holding that the petitioner was chargeable with one-half of the community income attributable to Mr. Harrold's services for the years 1946, 1947 and 1948.

(b) The Tax Court erred in holding that the tax on said community income had not already been paid by petitioner's husband, who as the manager of the community, was personally liable for the taxes on petitioner's share of the community income.

(c) The Tax Court erred in holding that petitioner's husband had not already paid the taxes on her share of the community income out of or with community property, which community property was responsible for the payment of petitioner's taxes on community income.

(d) The Tax Court erred in holding that the tax on petitioner's share of the community income had not been paid by petitioner's husband and charged against community funds.

(e) The Tax Court erred in holding that petitioner's husband's overpayment can not be applied as a set-off to petitioner's deficiency.

(f) The Tax Court erred in approving that portion of the deficiency for the taxable years 1946,

1947 and 1948 attributable to the community income earned by Mr. Harrold during said years.

(g) The Tax Court erred in denying petitioner's motion for further hearing to present additional evidence and for reconsideration.

(h) The Tax Court erred in ordering that decision be entered under Rule 50 in accordance with the Commissioner's computation as to the deficiency to be assessed against and paid by petitioner for the year 1948 in that no credit was allowed to petitioner for one-half the income tax withheld from Mr. Harrold's salary during the year 1948.

Wherefore, your petitioner prays that this Court review said decision of the United States Tax Court pursuant to the applicable statutes and the rules of this Court.

Dated: January 31, 1955.

/s/ DAVID LIVINGSTON,  
Attorney for Petitioner

Duly Verified.

[Endorsed]: T.C.U.S. Filed February 1, 1955.

[Title of Tax Court and Cause.]

NOTICE OF FILING PETITION FOR  
REVIEW

To the Chief Counsel, Internal Revenue Service,  
Washington, D. C., Attorney for Respondent:

You Are Hereby Notified that on February 1, 1955, petitioner filed with the Clerk of the Tax Court of the United States at Washington, D. C., a petition for review by the United States Court of Appeals for the Ninth Circuit of the decision of said Tax Court rendered on December 20, 1954, in the above-entitled case. Attached hereto is a copy of said petition for review.

Dated: February 4, 1955.

DAVID LIVINGSTON,  
Attorney for Petitioner

Affidavit of Service by Mail attached.

[Endorsed]: T.C.U.S. Filed February 8, 1955.

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[Title of Tax Court and Cause.]

ORDER ENLARGING TIME

For cause, it is

Ordered: That the time for filing the record on appeal and docketing the appeal in the United States Court of Appeals for the Ninth Circuit is extended to May 2, 1955.



Dated: Washington, D. C., February 8, 1955.

[Seal]            /s/ JOHN W. KERN,  
                         Chief Judge

Served March 9, 1955.

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[Title of Tax Court and Cause.]

### CERTIFICATE

I, Victor S. Mersch, Clerk of The Tax Court of the United States do hereby certify that the foregoing documents, 1 to 15, inclusive, constitute and are all of the original papers and proceedings on file in my office as called for by the "Designation of Contents of Record on Review" in the proceeding before the Tax Court of the United States entitled: "Ella E. Harrold, Petitioner, vs. Commissioner of Internal Revenue, Respondent, Docket No. 40953," and in which the petitioner in The Tax Court proceeding has initiated an appeal as above numbered and entitled, together with a true copy of the docket entries in said Tax Court proceeding, as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 16th day of March, 1955.

[Seal]            /s/ VICTOR S. MERSCH,  
                         Clerk, The Tax Court of the  
                         United States

[Endorsed]: No. 14694. United States Court of Appeals for the Ninth Circuit. Ella E. Harrold, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of Record. Petition to Review a Decision of The Tax Court of the United States.

Filed: March 21, 1955.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.

In the United States Court of Appeals  
for the Ninth Circuit

No. 14694

**ELLA E. HARROLD,**                                Petitioner,  
vs.  
**COMMISSIONER OF INTERNAL REVENUE,**  
Respondent.

## PETITIONER'S STATEMENT OF POINTS

Ellsworth Harrold, the former husband of petitioner, Ella E. Harrold, filed returns for the years 1946, 1947 and 1948, in which he reported his entire earnings and paid income taxes thereon.

In a divorce action commenced by Mrs. Harrold against her husband, the Superior Court of California granted her a decree in which the court computed the community property (consisting of income of Harrold, less expenses and before taxes) up to July 31, 1948, to be \$62,898.34. The court then

allowed to Harrold \$61,164.10 on account of taxes on his earnings which he had paid during the years above mentioned. Thus, the community property was virtually exhausted.

After the interlocutory decree of divorce, Harrold filed amended returns for the years 1946 to 1948, inclusive. In these returns he reversed the position which he had theretofore taken, and instead of reporting his entire earnings he reported only one-half, describing it as community income. The Commissioner investigated Mrs. Harrold's returns, which for obvious reasons had not reported any part of her husband's income. The Commissioner added the other one-half of such income to her returns and assessed deficiencies accordingly. These have been upheld by the Tax Court.

In addition to the amended returns, Harrold filed claims for refund of the difference in taxes. The amount of these claims would, if allowed, exceed the total of the deficiencies levied against Mrs. Harrold for the period involved.

When the Commissioner notified Mrs. Harrold of the proposed deficiencies, she commenced a second suit in the California Superior Court seeking a determination that she was entitled to protection from Harrold against the proposed deficiencies. The Superior Court dismissed the action. Mrs. Harrold appealed to the District Court of Appeal of California. The order of dismissal was affirmed on the ground that divorce decree was *res judicata* and the bar to the second action. A petition for a hearing in the Supreme Court of California was denied.

On the basis of the foregoing facts, it follows that the taxes upon the income have been paid. In California the community income is liable for taxes thereon. In the divorce action the community income was charged with and satisfied the taxes. The taxes are therefore paid on such income. Hence, the Commissioner erred in levying the deficiencies against Mrs. Harrold. For the same reason the Commissioner should reject the claims of Harrold for refund, or in the alternative should set off the deficiencies against the claims for refund.

Dated: June 16, 1955.

DAVID LIVINGSTON,  
HAROLD R. FARROW,  
JAMES R. MANSFIELD,  
A. L. BJORKLAND, JR.,

/s/ By DAVID LIVINGSTON,  
Attorneys for Petitioner

[Endorsed]: Filed Jun. 21, 1955. Paul P. O'Brien,  
Clerk.

No. 14,694

IN THE  
**United States Court of Appeals**  
**For the Ninth Circuit**

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ELLA E. HARROLD,

*Petitioner,*

vs.

COMMISSIONER OF INTERNAL REVENUE,

*Respondent.*

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**OPENING BRIEF FOR PETITIONER.**

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DAVID LIVINGSTON,

HAROLD R. FARROW,

JAMES R. MANSFIELD,

A. L. BJORKLUND, JR.,

2025 Russ Building, San Francisco 4, California,

*Attorneys for Petitioner.*

**FILED**

**DEC 21 1955**

PAUL P. O'BRIEN, CLERK



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No. 14,694

IN THE

**United States Court of Appeals  
For the Ninth Circuit**

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ELLA E. HARROLD,

*Petitioner,*

vs.

COMMISSIONER OF INTERNAL REVENUE,

*Respondent.*

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**OPENING BRIEF FOR PETITIONER.**

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**1. Statement of the case in compliance with Rule 18(2)(c).**

The taxes involved are those of petitioner Mrs. Ella E. Harrold for the years 1946, 1947 and 1948.

The question to be decided is as follows:

A husband paid taxes on his entire income from personal services. Thereafter, in a divorce suit, the Superior Court of California charged such taxes against the community property and the decree distributed the residue between the parties. After the decree of divorce the husband changed his position, filed amended returns reporting only one-half of the income and claimed a refund of taxes. The Commissioner reopened the wife's returns and added to her income one-half of the husband's earnings.

*Quaere:* Is the proper solution of the problem to direct that the additional tax chargeable against the wife should be set off against the refund which would be payable to the husband as the result of the deduction of half of his reported income from earnings?

What was the consequence of the husband's election to report his earnings and to pay taxes thereon and his procurement of reimbursement by the divorce court. Did such procedure constitute a conclusive determination of the liability for taxes on the income even though a tax savings could have been accomplished if the husband had initially elected to split the income as community property?

The facts were stipulated in the Tax Court. They are as follows:

During the years 1946, 1947 and part of 1948, and many years prior thereto petitioner was married to Ellsworth Harrold. Except for a brief period in 1945 they lived together at Sacramento, California, until March 25, 1948, when they separated. Mrs. Harrold sued for divorce in the California Superior Court.

During the years in question they filed separate returns. In his returns Mr. Harrold reported his personal earnings in their entirety. He also reported income from separate assets. On the aggregate amount of this income Harrold computed his taxes and made payment accordingly.

During these same years, the petitioner, Mrs. Harrold, filed returns showing income from her separate assets and paid taxes thereon. She did not include any of her

husband's earnings in her return. The amount paid by her was as follows:

1946 .....	\$1,567.24
1947 .....	428.39
1948 .....	676.75

In 1948 the divorce action came on for trial. The Superior Court determined the amount of income attributable to Harrold's personal services during said years and held that this was community property. The court then proceeded to take into consideration the living expenses of the parties during those years and deducted them from the community income. The balance was \$62,898.34. Of this balance the court allotted to Harrold \$61,164.10 on account of income taxes which he had paid during said years for the account of community. The result was that the community property determined as of the date of the trial was virtually exhausted. All that remained was \$1,734.24 and of this Mrs. Harrold was awarded one-half, or \$867.12.

The interlocutory decree of divorce embodying this award was entered in the State Superior Court on February 15, 1949.

Subsequent to the entry of the decree, Harrold filed with the Bureau of Internal Revenue amended income tax returns for said years. Therein he reported only one-half of the income attributable to his personal services.

He also filed claims for refund based on the theory that he had overstated his income by including in his original returns Mrs. Harrold's one-half community interest therein.

As the result of Harrold's claims for refund, the Commissioner reopened Mrs. Harrold's tax returns and determined that one-half of Harrold's income should be added to the income reported by Mrs. Harrold for the years 1946, 1947 and 1948. The Commissioner levied deficiencies against her accordingly in the aggregate amount of \$24,272.33, which bore interest of almost \$10,000 more, making a total obligation of \$34,000.

The refunds claimed by Harrold on the basis of his amended returns exceed the amount of the deficiencies and interest assessed against Mrs. Harrold for the period involved.

While the matter was pending in the Bureau of Internal Revenue, Mrs. Harrold commenced an action in the Sacramento Superior Court for relief against the consequences of Harrold's change of position.

The complaint was dismissed by the Superior Court.

Mrs. Harrold appealed to the District Court of Appeal of California. While the appeal was under submission the decision of the Tax Court in this case was announced. The deficiencies were affirmed.

Thereafter the District Court of Appeal filed its judgment affirming the dismissal in the Superior Court. The basis of the decision was that Mrs. Harrold's action was barred by the principle of *res judicata*. (*Harrold v. Harrold*, 127 Cal. App. 2d 582.) A petition for hearing by the Supreme Court of California was denied.

Mrs. Harrold brought to the attention of the Tax Court the decision of the appellate court of California. She requested the Tax Court to permit her to file the state

court's opinion as evidence in the tax case. The offer was rejected by the Tax Court.

If Mrs. Harrold is barred from relief in the state courts, she must pay, for a second time, taxes on the community income, which taxes were refunded to her husband when the state divorce court appropriated her share of such community income for that purpose. If Harrold should receive from the Treasury Department another refund of income taxes which he paid as manager of the community and for its account, the result will be a miscarriage of justice almost without precedent.

The Tax Court was not oblivious of the injustice of the situation. In its opinion the Tax Court said:

We recognize that there is a strong, equitable consideration here in petitioner's favor. In arriving at a division of community property, the Superior Court of California charged petitioner's share with the Federal income taxes previously paid by her former husband. But although he may now recover a refund of an amount previously credited to him in the divorce settlement, we cannot presume to adjust possible inequities therein. (T. p. 45.)

**2. Statement of petitioner's contentions and specification of errors.**

The contentions of Mrs. Harrold on this appeal are the following:

1. The taxes assessable to Mrs. Harrold should be set off against the refunds claimed by her husband.

The Tax Court is not impotent to prevent the perpetration by Harrold of this fraud against the petitioner. The Federal courts are not obliged to cooperate with Harrold

so as to enable him to achieve the objective of his shrewd maneuver.

2. When Harrold elected to pay the taxes on his earnings and thereafter such earnings were diminished and virtually exhausted by the divorce court in making an accounting, the tax on the entire income was paid and satisfied out of the proper source by the party responsible for its payment.

3. When the tax was paid, Mrs. Harrold's obligations were satisfied so that the Commissioner is barred from levying a tax against her on the same income; by the same reasoning, it would be incumbent on the Commissioner to reject Harrold's claim for refunds.

4. The Tax Court should have received in evidence the decision of the California District Court of Appeal in Harrold v. Harrold.

On the basis of the foregoing contentions, the petitioner specifies the following errors on the part of the Tax Court:

(1) Assuming that petitioner's husband can be deemed to have made an overpayment of taxes, the Tax Court erred in holding that such overpayment cannot be applied as a setoff against the alleged deficiencies against petitioner.

(2) The Tax Court erred in holding that petitioner is chargeable with one-half of the income attributed to Ellsworth Harrold's services for the years 1946, 1947 and 1948.

(3) The Tax Court erred in holding that the taxes on said income had not already been paid and satisfied

by petitioner's husband who, as the manager of the community, was personally liable for the taxes on petitioner's share of the community income as well as the taxes on his own share thereof.

(4) The Tax Court erred in holding that petitioner's husband had not made a conclusive election when he paid the taxes on her share of the community income, using for that purpose the community property which was responsible for the payment of both petitioner's and his own taxes on the community income.

(5) The Tax Court erred in denying the motion of petitioner to put in evidence the decision of the California District Court of Appeal in Harrold v. Harrold which was announced subsequent to the filing of the opinion of the Tax Court.

The opinion of the District Court of Appeal is made a part of the Transcript of Record by reference to volume 127 of the Advance California Appellate Reports, pages 725-728, thereafter published in permanent form at 127 Cal. App. (2d) 582 (T. p. 50). The refusal of the Tax Court to receive in evidence the decision of the District Court of Appeal is assigned as error (par. (g) T. p. 57). Therefore, the decision of the California appellate court is before the Court of Appeals for such consideration as it merits in the détermination of this proceeding.

**3. The case at bar does not involve an effort on the part of the petitioner to prevent the Government from collecting taxes to which it is entitled.**

Mrs. Harrold is not seeking to frustrate the collection of taxes. On the contrary, the Government has

received its taxes and Mrs. Harrold has been charged with and has satisfied the obligation as the result of the exhaustion for that purpose of the very income which is the subject of the taxes.

If the situation were permitted to remain in status quo, the Government would suffer no loss.

In prior cases in which the principle of division of community income has been involved, the Government was endeavoring to secure payment of the full amount of taxes.

For example, where the wife has a large separate income, and the husband's income consists only of personal earnings, it would be to the disadvantage of the Government to permit the husband to include all of the earnings in his return. The reason is that the wife's income is in higher brackets.

Another example is where the husband has reported the entire community income but as the result of his bankruptcy the Government has been unable to collect. In that case the Government's obvious recourse is to add one-half of the income to the wife's return and—if she is solvent—to collect from her.

In the case at bar the situation is just the reverse. Here the course which the Commissioner has pursued will—if permitted to proceed to consummation—result in diminishing the aggregate amount of taxes payable on Harrold's earnings. This is so because if the deficiencies against Mrs. Harrold are upheld, her former husband will collect as refunds from the Government substantially more than the amount for which Mrs. Harrold is liable.



Hence, the only person who stands to profit is Harrold and the question to be determined is whether the administrative and judicial arms of the Federal Government are compelled to co-operate with Harrold in his strategy and provide him with the means of perpetrating this obvious injustice.

It is the contention of the petitioner that the Federal courts are not impotent in the matter and that they are not without the power and means of preventing the taxing agency from being used by Harrold as his helpless accomplice.

4. **A conclusive method of determining the proper course for the Commissioner to pursue is to assume that Mrs. Harrold is financially irresponsible.**

The law and its administration must be the same regardless of Mrs. Harrold's solvency. Hence, in order to test the propriety of the program adopted by the Commissioner we should consider the position on the hypothesis that Mrs. Harrold is unable to pay the deficiencies assessed against her.

So the pertinent question arises: Would the Government be obliged to make the refunds to Harrold and thereby be deprived of its taxes on one-half of the community income?

The Tax Court has ruled that the Commissioner has no alternative—that neither the husband nor the community property is responsible for the taxes which would be assessable against the wife as the result of a split of the community earnings; and that the Commissioner has no power to make an offset.

This ruling, we respectfully submit, is based on a misinterpretation of the authorities.

5. In California the husband is the sole manager of the community property, and he—as well as the community property itself—is liable for the taxes assessable on the basis of split returns against both husband and wife.

The proposition stated in the above title has been twice decided in the Federal Court of California.

In the Matter of *Richard F. Ryan, d/b/a Ryan Furniture Co., Bankrupt*, a case decided in the United States District Court for the Southern District of California, Central Division, on December 13, 1949, and reported in the 1951 CCH Standard Federal Tax Reporter at paragraph 9493, the Government made a claim against Ryan's estate in bankruptcy for the amount of income taxes payable by Ryan's wife.

Each of the spouses had filed separate returns. The community income was split equally in the returns. It had been derived partly from the husband's services and partly from other assets directly traceable to his services.

The Trustee in Bankruptcy opposed the claim, contending that Ryan's bankrupt estate was not liable for the tax on Mrs. Ryan's share of the community income.

The Referee sustained the Trustee's objection.

The District Court reversed, holding as follows:

*Conclusions*

- (a) That 100% of the community property is liable for the taxes upon said half of the 1945 income reported in Mrs. Ryan's return and assessed in her name;

- (b) That Mr. Ryan, as sole manager of the community enterprise, is personally liable for the payment of said tax so reported and so assessed; and
- (c) That the Referee's order should be reversed and the Trustee's objections to the Government's claim should be denied. (1951 CCH Standard Federal Tax Reporter, par. 9493, p. 17274.)

To the same effect is *Matter of George J. Rogers, d/b/a Coast Door & Sash Co.*, decided by the Referee in Bankruptcy in the United States District Court for the Southern District of California, Central Division, October 18, 1951, and reported in the 1951 CCH Standard Federal Tax Reporter at paragraph 9495.

In the *Rogers* case the Trustee in Bankruptcy was resisting a claim against the bankrupt's estate made by the Government for income taxes payable by the bankrupt's wife. Both husband and wife filed separate returns for the year 1947. All income reported was community property, derived partially from the husband's services and in part from the assets of the community.

The Referee held:

### *Conclusions of Law*

- I. That all of the community property of the spouses is liable for the taxes reported by (the wife) in her separate return for the year 1947 and assessed in her name.
- II. That (the husband), as sole manager of the community enterprise, is personally liable for the payment of the tax so reported and assessed.

In an effort to avoid the effect of the foregoing decisions, the Tax Court describes them as “dictum” (T. p. 42). We respectfully submit that the Tax Court is mistaken. In both cases the points are squarely decided and are entitled “Conclusions of Law”.

The Tax Court also refers to the fact that both of the bankrupt estates were “composed entirely of community property” (T. p. 42). But the Tax Court does not indicate whether this should be regarded as a ground of distinction. If such is the implication, it would not be sound. In the case at bar Harrold was awarded the bulk of the community income because of the fact that he had paid taxes on such income. Consequently, community property is the subject matter involved here, just as it was in the two bankruptcy cases.

Therefore, we respectfully submit that the learned Tax Court fell into error in stating: “This contention (that the husband is liable) is not supported by any citations of authority either in the cases or by petitioner” (T. p. 42).

Then, with respect to petitioner’s contention, the Tax Court says:

It is contrary to a line of cases in which we, and other courts, have held that the powers of management conferred upon the husband by community property laws do not render him personally liable for taxes on his wife’s share of the community income. (T. p. 42.)

In support of this statement the Tax Court cites *Poe v. Seaborn*, 282 U. S. 101, 75, L. Ed. 239, *Cavanagh*

*v. C. I. R.*, 42 B. T. A. 1037, and *Marshall v. C. I. R.*, 41 B. T. A. 1064. With all deference we respectfully submit that the Tax Court has erroneously stated the ruling in these cases. None of them involved the right of the Government to collect from the husband the tax on the share of the community income returnable by the wife—nor the right of the Government to retain tax payments made by the husband on account of the community income and to charge against such payments the amount assessable against the wife.

On the contrary, in *Poe v. Seaborn*, 282 U. S. 101, 75 L. Ed. 239, the sole question was whether the husband and wife, residing in Washington, had the right to report one-half of the community income in their separate returns. The court sustained this right on the ground that “the wife has, in Washington, a vested property right in the community property, equal with that of her husband; and in the income of the community, including salaries or wages of either husband or wife, or both” (282 U. S. 111; 75 L. Ed. 243). Accordingly, the court rejected the Commissioner’s contention that the husband was obligated to report the entire community income and pay taxes thereon.

The difference between *Poe v. Seaborn* and the case at bar is that Seaborn had never reported the income as his own; he had never voluntarily paid taxes thereon; his wife reported one-half of the income in her return and presumably paid taxes thereon. The spouses had complied with the requirements of the law. That was the situation when the Commissioner stepped in and sought to upset it. Obviously, he could not prevail.

The Supreme Court recognized that the husband is the manager of the community property and quoted language to that effect from an earlier opinion in *Warburton v. White*, 176 U. S. 484, page 494; 44 L. Ed. 555, page 559. There the court also declared that the right of management was "vested in him (the husband), not because he was the exclusive owner, but because by law he was created the agent of the community" (282 U. S. p. 112; 75 L. Ed. p. 244).

*Cavanagh v. C. I. R.*, 42 B. T. A. 1037 and *Marshall v. C. I. R.*, 41 B. T. A. 1064, go no further than *Poe v. Seaborn*, except that they deal with wives who were residing outside of the State of California where the husband's services were performed and the income received. The husband was entitled to report one-half of such income because it was community income, notwithstanding the absence of the wife.

Hence, the sole question in *Cavanagh* and *Marshall* was—as in *Poe v. Seaborn*—whether the husband could be taxed in higher brackets by compelling him to return the entire community income. The Board held that because of the rule that the wife's domicile follows the husband's, the absence of the wife did not justify a departure from the principle that the community income may be divided.

The *Cavanagh* and *Marshall* cases did not involve the remedy available to the Government to collect taxes on the entire income.

There is nothing in those cases to the effect that if *Cavanagh's* wife failed to pay taxes on her share of

the income, the Government would be helpless and unable to proceed against Cavanagh, who had actually received all of the community earnings. As a matter of principle and common sense it must be clear that the Government could compel Cavanagh to pay the tax of both himself and his wife levied against them on account of income which was received in its entirety by Cavanagh and no part of which was received—except in a theoretical sense—by his wife.

The Tax Court quotes (T. pp. 42-43) from the Cavanagh opinion to the effect that the husband's control does not make him the owner of the community property and income, and that the wife is taxable on one-half of such income. As we have seen, that decision does not reach the point involved in the case at bar. The Tax Court says (T. p. 42) that the *Cavanagh* case "adequately answers petitioner's contention". Obviously, it does not.

The same comment is applicable to the citation by the Tax Court of *Marjorie Hunt v. C. I. R.*, 22 T. C. 228, where it was held that the wife must return one-half of the income and that she is liable for the tax thereon. But the *Hunt* case did *not* decide that a husband who received and retains the community income is *not* liable for the tax on the share of both of the spouses.

Also pertinent to this discussion is the Tax Court's description of petitioner's contention. According to the Tax Court, the petitioner "argues that . . . no part of such (community) income is now taxable to her" (T. p. 41). This is not a correct statement of petitioner's contention. What she does contend is that under the circum-

stances of this case the Commissioner should not enforce the liability against her but should do so out of the taxes which have already been paid by Harrold.

On the basis of the foregoing discussion, we conclude that the husband is liable for the tax on the entire community income even though it is reported in equal shares in the separate returns of the spouses.

From this premise it may readily be demonstrated that the proper and equitable course is to apply the tax assessable to Mrs. Harrold against the refunds claimed by Harrold.

The Tax Court says this may not be done. The answer is that there is no such inhibition either by statute or on principle. And even the prior decisions of the Tax Court which are cited in the opinion are not determinative of the question. These propositions we will now demonstrate.

6. **Fundamental principles of logic and justice demand that the taxes assessable to Mrs. Harrold should be set off against the refunds claimed by Harrold.**

As we have seen, the appellate court of California has professed its inability to frustrate Harrold's plan. The reason given is that the rule of res judicata bars Mrs. Harrold from relief.

But the Federal courts are not impeded by any such principle. They have control of the assessment of taxes as well as the refund thereof.

We have shown that the Commissioner has the right to collect from Harrold the taxes assessable against the



entire community income notwithstanding that it is divisible between the Harrolds for purposes of the return.

The Government has received from Harrold as taxes more than the amount which would be assessable against both of them on the basis of separate returns.

As a matter of logic and principle it follows that the Commissioner has the right to use the funds on hand for the purpose of satisfying the assessment which would otherwise be levied against Mrs. Harrold. The excess can be refunded to Harrold pursuant to his claims.

Neither the Supreme Court nor any Court of Appeals has considered the precise question involved in the case at bar. Hence, this Honorable Court has an open field.

Is there any legal obstacle to this program?

Cases have arisen in the Court of Claims which provide ample precedent in support of Mrs. Harrold's contention.

For example, in *Clayton v. U. S.*, 44 Fed. (2d) 427, the question involved Clayton's claim to recover interest on an overpayment of taxes resulting from a joint return reporting community income instead of dividing the income between Clayton and his wife.

The issue was similar to that at bar. The Government opposed the allowance of interest, contending that the overpayment made by Clayton should be set off against Mrs. Clayton's liability. Thus, the Government took the same position as that of Mrs. Harrold in the case at bar. The Government prevailed.

On the basis of the original joint return Clayton had paid more taxes than were due. Thereafter the error was corrected by the filing of separate returns by Clay-

ton and his wife. The Commissioner's action is stated in the opinion by the Court of Claims as follows:

The Commissioner allowed no interest upon the portions of the overassessments on the joint returns for 1918 and 1919 which were allocated and applied in satisfaction of the tax finally determined by him to be due separately by plaintiff and his wife, Julia S. Clayton, on the community property basis. (p. 431.)

Clayton's contention is stated in the opinion as follows:

. . . that, when the tax of plaintiff and his wife was computed separately on the community property basis, the overassessments of the tax as shown assessed and paid on the original joint returns of plaintiff and his wife for 1918 and 1919 were overpayments by the plaintiff, and, when a portion of such tax was allocated in satisfaction of the tax due by Mrs. Clayton on the community property basis, interest was payable on such amounts to plaintiff as provided by section 1116 of the 1926 act as in the case of other credits. (p. 432.)

The Commissioner's contention is stated in the opinion as follows:

. . . that no interest was payable upon that portion of the tax paid upon the original joint returns which was allocated to the tax due by Mrs. Clayton on a separate community property basis, because the payment of that amount on the original joint return was merely a payment by her in respect of her tax. (p. 432.)

The Court of Claims held that Clayton was not entitled to interest on that portion of the overassessment against

him which was subsequently allocated to the tax payable by Mrs. Clayton based on the split of community income. The reason for this decision was that when Clayton paid taxes on the entire community income, so much of the amount paid which should have been paid by Mrs. Clayton was her tax paid out of community funds. The opinion of the Court of Claims is so pertinent that it justifies extended quotation, viz.:

On the third issue, we are of opinion that the Commissioner of Internal Revenue correctly refused to allow and pay interest upon that portion of the over-assessment on the original joint returns subsequently allocated to the tax determined to be due by Mrs. Clayton, computed on the community property basis. The correctness of the determination of the income and the tax due by plaintiff and his wife on the community property basis and their right to report their income on the community property basis is not in question. When the original joint returns of plaintiff and his wife were made and the tax shown thereon was paid, a part of the tax was paid on the community income belonging to the wife and out of community funds belonging to her. To the extent, therefore, of the payment of the original tax on the entire income shown on these returns which should have been paid by the wife, it was her tax paid out of community funds. When the Commissioner of Internal Revenue, upon the claim of plaintiff and his wife, determined and computed the income and the tax separately on the community property basis and allocated a portion of the tax returned and paid upon the joint returns to the tax due by the wife upon that portion of the community income allocated to her, he was in contemplation of law using her money

which had been paid on the joint return out of undivided community funds in respect of the tax for which she would have been liable had separate returns been filed in the first instance. To the extent, therefore, of the tax liability of the husband and the wife when the income shown on the joint returns was divided between them, there was, in reality, no overpayment. But, for administrative purposes, the Commissioner correctly treated the excess of the tax shown and assessed on the joint return over that due by the plaintiff on a separate basis as an overassessment, since he signed the return, and his name only appeared on the assessment list. The community fund is an undivided fund in which the husband and the wife each have a one-half interest. (p. 432.)

Thus, the principle for which Mrs. Harrold contends was applied for the purpose of protecting the Government against the payment of excessive interest. The Government should not be permitted to blow hot and cold. If the Commissioner was right in the *Clayton* case, he is wrong in the case at bar.

The *Clayton* case was approved and followed by the Court of Claims in *Lattimore v. U. S.*, 12 Fed. Supp. 895, where it was held:

The next question relates to the individual case of the plaintiff, O. S. Lattimore (No. J-592). The facts have been most minutely set out in the special findings of fact, and we feel it is unnecessary and burdensome to this opinion to again state them.

Lattimore for the year 1918 filed a joint tentative original amended income tax return for himself and his wife, and the tax shown on this return was paid.

Later he filed a separate individual return showing a much smaller tax due, and subsequently he filed a claim for refund. The main contention made in this case is that the Commissioner applied a part of the amount paid by Lattimore in the joint return to the individual tax of the wife after the husband and wife had made separate returns, and Lattimore contends that the overpayment due to him, as found by the Commissioner, could not and should not be applied to the liability of his wife. We can find no merit in this contention. The overpayment arose due to the fact that there had been a joint return made and the tax liability of both husband and wife was reported and paid, but the assessment was made in the name of the husband and thereafter separate re-returns were filed and the liabilities of the two parties were shown separately. This, of course, gave an overpayment in favor of the husband, in whose name the assessment on the joint return had been made. The Commissioner, after several audits and after taking into consideration the claims of the husband, arrived at the conclusion that the payment made by the husband on the joint return was made from community funds, and that therefore, when the joint return was split up into two separate individual returns, a part of the payment made by the husband belonged to the wife, and he applied a part of the tax paid by the husband to the payment of the tax found to be due against the wife on her individual return. The husband recognized that the wife was entitled to a part of the amount paid when he filed a claim for refund and credit, and in fact made such allocation to his wife. (pp. 910-911.)

The foregoing cases demonstrate that the Commissioner has the power to set off the husband's overpayment

against the wife's tax liability. If the Commissioner can do so, the Tax Court has the same authority. But—the Tax Court says—"we cannot direct what is to be done with his (Harrold's) refund" (T. p. 45). At that point the Tax Court's opinion refers to the *Clayton* and *Lattimore* cases and seeks to distinguish them on the ground that "in each of these cases, the overpayment resulted from a joint return of both spouses, thus clearly indicating that the amount originally paid with the joint return was meant to apply to the tax liabilities of each" (T. p. 46).

There is no basis for the attempted distinction. In the first place, the initial filing of a joint return does not provide any implication as to what may be in the mind of the husband with respect to the consequences of a different allocation of income in the future.

Assuming—as the Tax Court asserts—that any such inference should be drawn from the fact that the Claytons initially filed a joint return, there is just as much reason for drawing the same inference from the course initially pursued by Harrold. When he elected to tax himself on the basis of his entire earnings, he clearly indicated that no tax should be levied against his wife on account of such earnings. That indication is just as effective as the one which the Tax Court seeks to use in an effort to distinguish the *Clayton* and *Lattimore* cases.

Second, there is nothing in the *Clayton* or *Lattimore* opinions indicating that the Court of Claims attached any significance to joint returns as evidence of the taxpayer's intent.

Third, the question is one of the power of the Commissioner to make the offset and of the courts which review his action to direct him to do so. That power does not depend on the will of any taxpayer. The power cannot be conferred on the Commissioner by the form of the original return. Nor can he be deprived of the power because a different form is used.

Finally, the concept advanced by the Tax Court that in the case at bar the Commissioner's power to make a setoff can be derived from the consent of the taxpayer is in conflict with rulings by the Board of Tax Appeals in cases on which the Tax Court relies in support of its decision here. The Board refused to require the Commissioner to make a setoff even though the taxpayer involved was willing and urged such adjustment. The citations from the Board of Tax Appeals appear at page 44 of the transcript. These cases will be analyzed later.

The subject of offset arose in the Court of Claims for a third time in *Marshall v. United States*, 26 F. Supp. 474. There the plaintiff, Mrs. Marshall, was formerly married to Morosco. They agreed that their respective earnings would be separate property. Each of them reported income accordingly. Mrs. Morosco's income was much larger than her husband's and likewise her tax.

The Commissioner audited the Moroscoss' books and determined that they must each return one-half of the aggregate income, resulting in a substantial overassessment for the wife and a deficiency against the husband.

Under California law the wife's earnings were always community property. At the time the Moroscoss' case

arose the law had been changed so as to confer on the wife a vested interest in the community property. This, of course, was applicable to community income. Consequently, if there had been no agreement between the Moroscas as to ownership of their earnings, each would have been obliged to report one-half of the aggregate income.

There was a serious question whether the California law as to community earnings could be annulled by contract. The point had arisen in the case of another taxpayer. For this reason the Commissioner decided to defer action as to Mrs. Morosco's overassessment and notified her to that effect. But about a year later the Commissioner informed Mrs. Morosco that the certificate of overassessment would be withheld until Morosco paid his deficiency. Eventually, the Commissioner announced that the overassessment would not be refunded.

Mrs. Morosco sued (under her new name after a divorce from Morosco) contending (1) that an account had been stated, and (2) that the community property law of California was paramount and could not be annulled by contract. The majority of the court rejected both contentions and sustained the action of the Commissioner.

But one member of the court—Judge Littleton—disagreed as to the second point. He decided that the agreement of the Moroscas as to earnings was ineffectual to avoid the consequences of the 1927 change of the California community property law. But he concurred in the result, basing his opinion on a different ground, viz.: that Mrs. Morosco's overassessment and Morosco's de-



iciency must be set off against each other. Citing the *Clayton* and *Lattimore* cases, Judge Littleton said:

However, since plaintiff returned income which under the community interest was taxable to her husband and in the absence of facts to the contrary, it must be assumed that the tax of \$23,275.58 here involved was likewise paid out of the community income erroneously reported by plaintiff. The Commissioner, therefore, acted correctly when he refused to make a refund to plaintiff. Compare *Benjamin Clayton v. United States*, 44 F. 2d 427, 70 Ct. Cl. 740; *Lattimore et al. v. United States*, 12 F. Supp. 895, 82 Ct. Cl. 97, 130, 131. The refund provision should have a practical application. In a case such as this we cannot assume that the tax applicable to the community income taxable to the husband, which plaintiff remitted, belonged to plaintiff any more than did the income erroneously reported by her. Therefore, a tax paid by either husband or wife out of community property follows the community income for tax purposes. The facts and circumstances involved in this case distinguish it from *Krug v. United States*, 18 F. Supp. 242, 84 Ct. Cl. 502. I therefore concur in the decision dismissing the petition. (p. 480.)

Of course, Judge Littleton's views do not necessarily express the opinion of the majority of the court. But they are entirely consistent with its prior decisions and it is only reasonable to assume that if the other members of the court had found it necessary to determine the point, they would have agreed with Judge Littleton's view.

It is of particular interest that Judge Littleton did not deem it necessary to mention either the fact that the original returns were separate, rather than joint; or the

fact that Mrs. Morosco did not consent to the offset; or that Morosco was not a party to the action. Hence, it is reasonable to conclude that in Judge Littleton's opinion these circumstances did not affect the application of the principle of offset.

It is worthy of note that at the time of the Marshall decision (1939) Judge Littleton was no novice in the field of taxation. He had been a member of the Board of Tax Appeals from 1924 to 1929, occupying the position of Chairman during the last three years. Then he was promoted to the Court of Claims and ever since has been a member of that court.

Confronted with Judge Littleton's concurring opinion and realizing that it disposes of all of its efforts to distinguish the *Clayton* and *Lattimore* cases, the learned Tax Court states:

We do not consider ourselves bound by any language to the contrary as expressed by a concurring opinion in *Corrine Griffith Marshall v. U. S.* 88 Ct. Cl. 393, 26 F. Supp. 474 (1939). (T. p. 45.)

That is undoubtedly true. A concurring opinion is not controlling. But its reasoning in the added light of the prior decisions of the Court of Claims should provide persuasive grounds for a determination in the case at bar for which the Tax Court recognizes "that there is a strong equitable consideration" (T. p. 45).

In an earlier section (sec. 4) we suggested the hypothesis that Mrs. Harrold is financially irresponsible and pointed out that in that case the Government would not confess itself helpless to collect the full amount of

taxes to which it is entitled. The same consideration would apply if the statute of limitations barred an assessment against Mrs. Harrold. In that case the Government would find a means of preventing Harrold from recovering a refund.

Such a situation confronted the United States Supreme Court. The parties involved were the trustees and the beneficiary under a trust. In *Stone v. White*, 301 U.S. 532, 81 L. Ed. 1265, the issue was:

. . . Whether the petitioners, testamentary trustees, who have paid a tax on the income of the trust estate, which should have been paid by the beneficiary, are entitled to recover the tax, although the government's claim against the beneficiary has been barred by the statute of limitations. (301 U.S. 533, 81 L. Ed. p. 1268.)

The facts in the *Stone* case were as follows: Galen L. Stone's will left property in trust. It provided that the net income therefrom be paid his wife as sole beneficiary at such times and in such amounts as she should deem best during her natural life. She elected to take the bequest under the will in lieu of her dower or statutory interest. At that time the various Circuit Courts of Appeals had decided that in these circumstances the income payments to the widow were annuities purchased by surrender of the dower interest and not taxable as income to her until they equalled the value of the dower interest. In conformity to the ruling of these decisions, Mrs. Stone did not include in her return any portion of the income received by her from the trust. The Commissioner assessed a deficiency against the trustees which they paid under protest. In the meantime, the statute of limitations had run against the right of the Government

to collect from the widow as beneficiary of the trust. Then the Supreme Court overruled the decisions of the Courts of Appeals, holding that the income was taxable to the beneficiary and not to the trustees. (*Helvering v. Butterworth*, 290 U. S. 365; 78 L. Ed. 365).

The trustees sued for recovery of the taxes which had been erroneously collected from them. Consequently, the Government was in a dilemma. Its right to pursue the beneficiary was barred. If it was compelled to make a refund to the trustees, no tax would be collected on account of the income.

In the District Court the trustee prevailed. The court held that the "trust, for income tax purposes, is an entity separate and distinct from the beneficiary of the trust" (*Stone v. White*, 8 Fed. Supp. 354, 355). The Circuit Court of Appeals reversed, and its judgment was affirmed by the Supreme Court, which answered the reasoning of the District Court as follows:

It is said that as the revenue laws treat the trustee and the beneficiary as distinct tax-paying entities, a court of equity must shut its eyes to the fact that in the realm of reality it was the beneficiary's money which paid the tax and it is her money which the petitioners ask the government to return. Formerly, trustee and cestui que trust were likewise distinct in the eyes of the law, as they are today for many purposes. But whenever the trustee brings suit in a court which is free to consider equitable rights and duties, his right to maintain the suit may be enlarged or diminished by reference to the fact that the suit, though maintained in the name of the trustee alone, is for the benefit and in the equitable interest of the cestui. (301 U. S. pp. 535-536; 81 L. Ed. p. 1270.)

The Supreme Court attached particular significance to the equitable aspect of the problem—a factor which the Tax Court noted in the case at bar—but to which the Tax Court was unwilling to give effect.

The same reasoning which was adopted to protect the Government against loss of taxes in *Stone v. White* should be equally available to Mrs. Harrold to protect her from being the victim of a monumental swindle on the part of her former husband. It should make no difference whose ox is being gored.

The Supreme Court readily surmounted the proposition as to the separate identity of two taxpayers. The same result can be and should be accomplished in the case at bar. It is this proposition upon which the Tax Court has placed particular emphasis. In its opinion the court says:

We have repeatedly held that each spouse is a separate and distinct taxpayer, and that we cannot require the Commissioner to credit one with a refund due the other. (T. p. 44.)

The foregoing statement is based on cases decided by the Board of Tax Appeals. Of course, in the case at bar this Court is not obliged to follow the Board of Tax Appeals, particularly in view of the contrary decisions of the Court of Claims.

However, an examination of the cited decisions of the Board of Tax Appeals will disclose that even the Board has not been consistent in their treatment of cases involving husband and wife and community income.

In *Preston v. C. I. R.*, 21 B. T. A. 840, the facts were as follows:

Preston and his wife, residents of California, filed separate returns, each reporting one-half of the husband's earnings, and paid taxes thereon. At that time the wife's interest in community property was merely an expectancy. Consequently, the Prestons were not entitled to split the income. Accordingly, the Commissioner ruled that the entire income was taxable to Preston and a deficiency was assessed against him. The Commissioner did not credit the amount of the additional tax found to be due from Preston with the amount of the tax previously paid by his wife (p. 840).

The Board upheld the Commissioner in his determination that the entire income was taxable to Preston but they reversed the Commissioner's refusal to make the offset. The Board decided that because the case involved community income, all of it was taxable against the manager of the community and the proper course was to adjust between the spouses the total amount paid as taxes on such community income.

The Board said:

Petitioner also asserts that in computing the amount of the deficiency due from him on the community income, credit should have been allowed for the amount of tax already paid upon the wife's return. Ordinarily the proper method of treating such a situation would be to refund the overpaid tax to the wife, who made her return as a taxpayer. In this case, however, it appears that all income returned by the wife was community income. The wife had no separate income and the tax paid on the wife's return was paid on the community income. The Commissioner is now asserting that all such income is

taxable to the husband, the manager of the community. It would therefore seem proper that the husband should be allowed credit for the total amount of tax paid on the community income return by both spouses, to the extent that such payment has not been refunded or otherwise credited. (p. 849.)

There is no basis for distinguishing the *Preston* case from that at bar insofar as the application to community income is concerned. The only difference is one without a distinction. The Prestons split the community income at a time when, under the law of California, they were not entitled to do so. Here Harrold reported the entire community income at a time when, under the law of California, it was proper to divide it in half. If—as the *Preston* case decides—the Commissioner had the power to, and it was proper for him to, set off the amount erroneously paid by Mrs. Preston against the amount which Preston owed because he had underpaid his tax, it was likewise proper for the Commissioner to take similar action with respect to the additional tax against Mrs. Harrold and the overpayment which had been made by her husband. Furthermore, in view of the fact that the Board of Tax Appeals reversed the Commissioner and that its opinion constituted a direction that he make the offset, it is equally clear that the Tax Court should have pursued the same course in the case at bar.

With respect to the *Preston* case, the Tax Court says: Petitioner cites John W. Preston, 21 B. T. A. 840 (1930), wherein we might appear to have made an exception to that rule. However, in that case, the two spouses were still married and living together. (T. p. 44.)

The answer is that—as we shall hereafter show—the *Preston* case does not represent an exception to any rule and, as the extract above quoted from the opinion of the Board discloses, the decision was not based on the continuance of the *Preston* marriage. On the contrary, the subject was not even mentioned and for all that appears in the opinion the marriage may have terminated.

Furthermore, as a matter of principle, the propriety of an offset results from the nature of the earnings as community property when received and does not depend on whether the spouses remain married to each other.

There is another answer to the effort of the Tax Court to distinguish the *Preston* case from that at bar.

The earliest case in the Board of Tax Appeals in which the issue of setoff arose is *Vayssie v. C. I. R.*, 8 B. T. A. 587, decided in 1927. This is cited by the Tax Court in support of its decision at bar (T. p. 44). The ruling in the *Vayssie* case cannot be reconciled with that in *Preston v. C. I. R.* which was decided three years later.

Vayssie and his wife, residents of California, filed separate returns, splitting the community income, and paid taxes accordingly. This was prior to the 1927 amendment of the California law which conferred on the wife a vested interest in community property. Hence, the entire income was taxable to Vayssie and a deficiency was assessed against him. The Commissioner gave notice that Mrs. Vayssie's payment would be refunded to her.

Vayssie asked that the two items be set off against each other. The Commissioner refused. The Board made summary disposition of the case, viz.:



In our opinion, the Board has no authority to require the Commissioner to credit the petitioner's account with a refund due to the petitioner's wife. The Board can not require the Commissioner to credit one taxpayer's account with a refund due another taxpayer. (p. 589.)

Thus, there is a clear conflict between Preston's case and that of Vayssie. But *Preston v. C. I. R.* is subsequent in time and it provides a convincing reason why, in dealing with community income, a husband and wife should not be regarded as separate taxpayers—a subject which is not even mentioned in the *Vayssie* case.

Furthermore, the *Vayssie* case provides the answer to the effort of the Tax Court in the case at bar to distinguish *Preston v. C. I. R.* on the ground (T. p. 44) that the Prestons were married and living together. There was just as much basis for concluding that the marriage of the Vayssies was still in effect when the Commissioner refused to make the setoff.

The *Vayssie* case was not mentioned in the opinion in the *Preston* case. Hence, there is no means of ascertaining whether it was inadvertently overlooked; or on the other hand, the Board intended to overrule it. Let it suffice to point out that the *Preston* case is in complete accord with the decisions of the Court of Claims—cited above—which settle the point that with respect to the return of and taxation on community income a husband and wife are not to be regarded as separate taxpayers. The logic of this proposition is beyond question—as we shall now demonstrate.

**7. With respect to community income the spouses do not occupy the status of separate taxpayers.**

There is no need to analyze the history of the concept of community property and the manner in which it became engrafted upon the jurisprudence of Texas, Louisiana and some of the western states.

Although the wife has a vested interest in community property, she cannot exercise any control over it except to require restitution of property transferred by the husband without her consent (*Britton v. Hammell*, 4 Cal. (2d) 690).

The community income goes into the pocket of the husband. It is subject to his control. The dollars which he receives are not divided; the wife has no means of requiring that they be divided. It is only theoretically that the wife receives half of the income so as to require her to report it for tax purposes. As the court held in *Clayton v. U. S.*, 44 F. 2d 427 (supra):

The community fund is an undivided fund in which the husband and the wife each have a one-half interest. (p. 432.)

Husband and wife may be deemed separate taxpayers with respect to their separate incomes, separately reported. But this theory breaks down when we seek to apply it to the concept of community income which is an anomaly in the law.

Clayton challenged the power of the Commissioner to credit his overpayment against his wife's liability. Clayton contended that an adjustment could only be made with respect to the liability of a particular taxpayer. The court rejected this contention, holding:

The contention of plaintiff that the provisions of section 284 (a) of the Revenue Act of 1926 (26 USCA sec. 1065(a), with reference to the crediting of an overpayment on a return against any tax "then due by the taxpayer" must be literally construed; that the authority of the Commissioner is thus expressly limited to crediting overpayments to the tax due from the particular taxpayer; that the Commissioner has no legal authority in the case of a division of community income on a joint return equally between the husband and wife to credit one taxpayer's account with an overpayment by another taxpayer—argues against the claim that he and his wife had a right under the statute to make separate community property returns. (p. 432.)

The opinion of the learned Tax Court in the case at bar cites other decisions of the Board of Tax Appeals as examples of the ruling that husband and wife are separate taxpayers and that their taxes are not subject to setoff.

One of the cited cases—*Roebbling v. C. I. R.*, 28 B. T. A. 644—can readily be eliminated. That did not involve community income; it did not involve husband and wife. The parties were trustee and beneficiary. The Board held that income was taxable to the beneficiary and not to the trust which had reported the income and paid taxes on it. The decision was that "the trust and the beneficiary are, for income tax purposes, entirely different entities" (p. 656). Consequently, the Board held that it could not require the Commissioner to credit the beneficiary's account with a refund due to the trust.

Another case cited in the opinion at bar is *Hunt v. C. I. R.*, 47 B. T. A. 829. There the parties involved were husband and wife. But the subject of taxation was not community income. The wife had sold her separate real property and had claimed various deductions, one of which was the commission which she paid to the real estate broker. A dispute arose with the Commissioner as to whether the wife could take the deductions or, on the other hand, they should be divided equally between the husband and the wife. The Commissioner ruled that they should all be so divided. The Board reversed the action of the Commissioner as to all of the items except the broker's commission. The consequence was that there was a deficiency against the wife and a credit in favor of the husband. An effort to obtain a setoff was rejected on the ground that the spouses were two different taxpayers.

It is at once apparent that the matter of setoff did not involve community income. Consequently, the case is not in point.

This leaves one other citation—*Perine v. C. I. R.*, 22 B. T. A. 201—which was decided by the Board one year after the *Preston* case. An analysis of the facts fails to disclose how community income could possibly be involved in the effort to procure a setoff. The parties were S. W. Fuertel and wife, residents of the State of Washington. The Board's opinion states:

The husband and wife filed separate returns in which each returned one-half of the community income and their tax liability was determined by the respondent on that basis. This method of reporting

the income and computing the tax thereon was proper. (p. 204.)

It necessarily follows that any deficiency against the wife and overassessment with respect to the husband could not possibly involve community income. That income had been properly reported and properly taxed. Consequently, the decision of the Board that the spouses were separate and distinct taxpayers and that therefore no offset could be required could not have related to community income.

There is no doubt that the language of the Board's opinion—quoted by the Tax Court in the case at bar (T. pp. 44-45)—is broad enough to cover community income. But the Fuertel controversy did not involve community income and therefore, the point cannot be deemed to have been decided.

Furthermore, the Board's opinion proceeds to cite "*Alexander Vayssie*, 8 B. T. A. 587. Cf. *John W. Preston*, 21 B. T. A. 840". In thus citing two inconsistent decisions the Board added to the confusion.

Hence, it is surprising that the Tax Court has found in the Board's record a rule of decision worthy of being regarded as authority in the case at bar.

Certainly, there is no reason why the Court of Appeals should pursue the same course. On the contrary, there is every good reason why the Court of Appeals should prefer the reasoning of the Court of Claims as to the propriety of a setoff where community income of husband and wife is the subject of taxation.

8. The taxes received by the Government from Harrold were derived from community property.

The learned Tax Court says that "there is no evidence that the overpayment by her former husband was made out of community property" (T. p. 43). We submit that such a conclusion is compelled by the stipulated facts.

It is not necessary to show that Harrold's earnings were earmarked and that the precise dollars used by him to pay taxes were those which he received for his personal services.

The identity of the source as community property is established as a matter of legal concept. In *Clayton v. U. S.*, 44 F. 2d 427 (supra) the Court of Claims reached this conclusion without any direct evidence on the subject. There was no testimony or other proof as to the particular dollars which had been used for payment of the tax. The mere fact that the community income was reported and the tax paid thereon was sufficient to demonstrate that the payment was made out of community funds. On this subject the Court of Claims said:

When the original joint returns of plaintiff and his wife were made and the tax shown thereon was paid, a part of the tax was paid on the community income belonging to the wife and out of community funds belonging to her. To the extent, therefore, of the payment of the original tax on the entire income shown on these returns which should have been paid by the wife, it was her tax paid out of community funds. (p. 432.)

The conclusion of the Court of Claims as to the community source of the tax payment was not, and could

not, have been based on the fact that the Claytons filed a joint return. The significant fact was that community income was reported. In this respect the form of the return was immaterial.

In *Marshall v. U. S.*, 26 F. Supp. 474 (supra) Mr. and Mrs. Morosco each filed separate returns. Nevertheless Judge Littleton in his concurring opinion pointed out that it was a necessary assumption that the tax was paid out of community income. He said:

However, since plaintiff returned income which under the community interest, was taxable to her husband and in the absence of facts to the contrary, it must be assumed that the tax of \$23,275.58 here involved was likewise paid out of the community income erroneously reported by plaintiff. (p. 480.)

Judge Littleton then explained that under the controlling law of California Mrs. Morosco's earnings did not belong to her; likewise, the tax on her earnings which she remitted to the Collector did not belong to her. On those grounds he concluded:

Therefore, a tax paid by either husband or wife out of community property follows the community income for tax purposes. (p. 480.)

In the case at bar we have additional affirmative evidence which points inescapably to the conclusion that Harrold's tax payments were made out of community property. The fact is stipulated that reimbursement to Harrold on account of taxes paid by him was made from community assets (Par. 9, T. p. 35). Consequently, regardless of what particular dollars Harrold used to

pay the tax, the reimbursement out of community property provides a complete demonstration that the community property was charged with the tax money now in the hands of the Government. Therefore, in contemplation of law the payments came out of community funds.

9. **The fact that Harrold is not a party to this proceeding presents no obstacle to the setoff.**

In view of the fact that the subject of controversy is the tax payable to the Government, it is not necessary that Mr. Harrold be a party to this case.

The Government has adequate protection against any loss of taxes. The Treasury Department is in possession of the taxes paid by Harrold. There is no possible risk. The Government cannot be compelled to make a refund to Harrold unless and until he commences suit and procures a judgment. Such an action must be commenced in the Federal court. The decision in Harrold's suit must necessarily be consistent with that in the case at bar. If the Court of Appeals decides here that the setoff should be made, the Commissioner will be bound to reject Harrold's claim—except as to the excess. Confronted with the decision in this case, Harrold would realize the futility of further contest. If despite this court's ruling, Harrold should prosecute, an adverse outcome would be a foregone conclusion.

In this situation it is not necessary that this court's decision operate as *res judicata* against Harrold. The determination of the issue of law would suffice.



10. Harrold's election to report his earnings as his separate income was conclusive.

The law of California as to the community character of personal service income of the husband was settled more than twenty-five years ago. Hence, Harrold cannot profess ignorance when he filed his return for the year 1946. Thus, the situation is readily distinguishable from *Van Antwerp v. United States*, 92 F. 2d 871, and Harrold is conclusively bound by his return.

In *United States v. Pettigrew*, 81 F. 2d 666, Pettigrew filed a joint return for the tax year 1928 which he signed for himself and his wife. The return reported all of the community income. Pettigrew paid the tax. Subsequently he filed for a refund on the basis that he was taxable on only half of the community income. The District Court held that he was entitled to a refund. The Government appealed. The judgment was reversed by the Circuit Court on the ground that Pettigrew was bound by his election in reporting all of the community income in a joint return. The Court held:

Taxpayer here had from July 29, 1927, until March 15, 1929, to advise himself of the condition of the law of his domicile. If he had any doubt in his own mind he should have resolved it in favor of a return containing his half of the community earnings.

. . . . .

The cases cited by taxpayer, in which, under exceptional circumstances, amended returns have been allowed, have no application. Here the taxpayer had abundant time to inform himself as to the community property law, failed to do so, and chose to file a joint return.

The Commissioner's contention that having, in the circumstances of this case, exercised his option to file a joint instead of a separate return, he cannot claim a refund on the basis of a separate return calculation dividing the earnings of the community, must be sustained. (81 F. 2d 667.)

Pettigrew's election was evidenced by a joint return. Harrold's election was evidenced by a return in which he reported his earnings as his own. There is no logical distinction between the two. Harrold's election was just as conclusive as Pettigrew's.

It makes no difference what Harrold's motive was in reporting the earnings as separate income. It may be that he was planning to lay a foundation for claiming the earnings as his separate property in the event of litigation with his wife. However that may be, Harrold is bound by his election. The tax is irretrievably paid and there is no basis upon which the Commissioner can assess a tax on the identical income to Mrs. Harrold.

We cannot predict, of course, what action Harrold will take in order to secure a refund following the decision in this case. If this Court shall annul the assessment against Mrs. Harrold on the ground that the tax on the income has been paid and is not refundable, the decision will provide a precedent that will suffice to dispose of Harrold's claims, assuming that Harrold should prosecute them further.

On the other hand, if the Court shall be of the opinion that out of an abundance of caution the assessment against Mrs. Harrold should be held in abeyance until Harrold's claims have been rejected by the courts, then appropriate instructions can be given to the Commissioner and thereby

complete protection can be provided for the Government so that under no circumstances can it be deprived of taxes justly due.

The contention of petitioner presented in this section is, of course, aside from and independent of that previously advanced relative to setoff of the refund against the deficiency. Should this Court decide that such a setoff is proper under the circumstances of this case, a complete and satisfactory solution to the problem would be provided. Needless to say, such a decision is the one which should be preferred.

Dated, San Francisco, California, .

December 19, 1955.

Respectfully submitted,

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The first of these is the  
 fact that the system is  
 not self-sufficient. It  
 requires a constant supply  
 of raw materials and  
 energy. This is a major  
 problem for the system  
 as a whole. The second  
 problem is the fact that  
 the system is not  
 flexible. It is unable to  
 adapt to changing  
 conditions. This is a  
 major problem for the  
 system as a whole. The  
 third problem is the fact  
 that the system is not  
 efficient. It wastes a  
 great deal of energy and  
 resources. This is a  
 major problem for the  
 system as a whole.

No. 14,694

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**In the United States Court of Appeals  
for the Ninth Circuit**

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**ELLA E. HARROLD, PETITIONER**

*v.*

**COMMISSIONER OF INTERNAL REVENUE, RESPONDENT**

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**ON PETITION FOR REVIEW OF THE DECISION OF THE TAX  
COURT OF THE UNITED STATES**

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**BRIEF FOR THE RESPONDENT**

---

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JAN 27 1933

PAUL P. O'BRIEN



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Sec. 322).....



# **In the United States Court of Appeals for the Ninth Circuit**

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No. 14,694

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ELLA E. HARROLD, PETITIONER

*v.*

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

---

*ON PETITION FOR REVIEW OF THE DECISION OF THE TAX  
COURT OF THE UNITED STATES*

---

## **BRIEF FOR THE RESPONDENT**

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### **OPINION BELOW**

The opinion of the Tax Court (R. 37-46) is officially reported at 22 T. C. 625.

### **JURISDICTION**

This petition for review (R. 52-58) involves federal income taxes for the taxable years 1946, 1947 and 1948. On February 21, 1952, the Commissioner of Internal Revenue mailed to the taxpayer a notice of the deficiency in the total amount of \$32,883.63. (R. 12-19.) Within ninety days thereafter, and on May 14, 1952, the taxpayer filed a petition with the Tax Court for a redetermination of that deficiency under the provisions of Section 272 of the Internal

Revenue Code of 1939. (R. 6-30.) The decision of the Tax Court sustaining the deficiency in the amount of \$26,576.89 was entered on December 20, 1954. (R. 51.) The case is brought to this Court by a petition for review filed February 1, 1955. (R. 52-57.) Jurisdiction is conferred on this Court by Section 7482 of the Internal Revenue Code of 1954.

#### QUESTION PRESENTED

Where taxpayer and her former husband filed separate return for the taxable years involved, whether the Tax Court was correct in holding that taxpayer is liable for payment of taxes on her share of community income, and the Commissioner could not be required to apply an overpayment by her former husband to taxpayer's deficiencies under Section 322 (a) (1) of the Internal Revenue Code of 1939.

#### STATUTES INVOLVED

Civil Code of California (Deering, 1949):

SEC. 161a. [*Interests in community property.*] The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests under the management and control of the husband as is provided in sections 172 and 172a of the Civil Code. This section shall be construed as defining the respective interests and rights of husband and wife in the community property. [Added by Stats. 1927, p. 484.]

SEC. 172. [*Management of community personal property: Limitations: Consent of wife.*]

5

The husband has the management and control of the community personal property, with like absolute power of disposition, other than testamentary, as he has of his separate estate; provided, however, that he cannot make a gift of such community personal property, or dispose of the same without a valuable consideration, or sell, convey, or encumber the furniture, furnishings, or fittings of the home, or the clothing or wearing apparel of the wife or minor children that is community, without the written consent of the wife. [Enacted 1872; Am. Stats. 1891, p. 425; Stats. 1901, p. 598; Stats. 1917, p. 829.]

SEC. 177. *Rights of husband and wife governed by what.* The property rights of husband and wife are governed by this chapter, unless there is a marriage settlement containing stipulations contrary thereto. [Enacted 1872.]

Internal Revenue Code of 1939:

SEC. 322. REFUNDS AND CREDITS. (a) [As amended by Sec. 172 (e) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Authorization.*—

(1) *Overpayment.*—Where there has been an overpayment of any tax imposed by this chapter, the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer.

\* \* \* \* \*

(26 U. S. C. 1952 ed., Sec. 322.)

## STATEMENT

The relevant facts, most of which were stipulated by the parties (R. 33-36) and were found by the Tax Court (R. 38-40), may be summarized as follows:

Taxpayer and Ellsworth Harrold (hereinafter referred to as Harrold) were married in 1936, and thereafter resided in California as husband and wife. During 1945, certain differences arose between taxpayer and Harrold, and she commenced an action for separate maintenance. During the pendency of these proceedings, taxpayer and Harrold entered into a property-settlement agreement, dated June 30, 1945. However, on or about September 15, 1945, they became reconciled and again lived together as husband and wife in the State of California. (R. 38-39.)

Taxpayer and Harrold filed separate, individual, federal income tax returns for the calendar years 1946, 1947, and 1948. Harrold was the owner of two business enterprises. In 1946 he had them separately incorporated and the shares of stock issued to him. He reported the net income of these businesses, up to the time of incorporation, and the salary received thereafter from the corporations, as his separate income on his returns for 1946, 1947, and 1948. He paid taxes on the income so received, together with income received by him from various other sources. In her return filed for these years taxpayer did not report any of the income or salary from these two business enterprises. (R. 39.)

A second separation occurred during March, 1948, and a suit for divorce was instituted by taxpayer.

On February 15, 1949, an interlocutory decree of divorce was handed down by the Superior Court of the State of California, in and for the County of Sacramento. The Superior Court confirmed the property-settlement agreement, dated June 30, 1945, insofar as it effected transfers of property owned by taxpayer and Harrold at that time. (R. 39.)

The Superior Court further determined that the income attributable to the personal services of Harrold subsequent to September 15, 1945 (the date of the reconciliation), was community property. An adjudication was accordingly made by that court that a portion of the net income derived by Harrold from the two business enterprises prior to their incorporation, plus the entire salary received by him after the incorporation, constituted community property. (R. 39-40.)

In determining the residual amounts of the community property to be divided between taxpayer and Harrold, the Superior Court deducted from and charged the community property with various items, including living expenses and the amount of federal and state income taxes paid by Harrold. After such deductions were made the balance of the community property amounted to \$1,734.24, and one-half, or \$867.12, was awarded to taxpayer as her share of the residual community property. (R. 40.)

After the entry of the divorce decree, Harrold filed amended income tax returns for 1946, 1947 and 1948, in which he reported as income one-half of the portion of the business income which was attributable to his

personal services prior to incorporation, and one-half the salary he received after incorporation. He also filed claims for refund of a portion of the federal income taxes paid by him for these three years, based upon the theory that he had erroneously overstated his income for these years by including in his returns taxpayer's community share of the income from these two businesses. Pending the consideration of this refund claim, the Commissioner determined that one-half of the community income earned during 1946, 1947 and 1948 should be added to the income reported in taxpayer's returns for these years. (R. 40.)

The Tax Court held that taxpayer was liable for the payment of taxes on her share of community income and that the Commissioner could not be required to apply an overpayment by a former husband to taxpayer's deficiencies. (R. 37-46.)

Subsequent to Harrold's filing a claim for refund, but prior to the issuance of the Tax Court's opinion, taxpayer commenced an action against Harrold in the Superior Court of the State of California, in and for the County of Sacramento, to have that court either redetermine the amount of residue of the community property to be awarded to her, or issue a declaratory judgment that when Harrold collected any refunds she would be entitled to receive part thereof. Taxpayer's complaint was dismissed by the Superior Court; the judgment of dismissal was affirmed by the District Court of Appeals of California; and a petition for hearing by the Superior Court of California was denied by that court. (R. 54-55.)

1. Under Section 161a of the Civil Code of California, a wife's interests in community property during the continuance of the marriage relation are present, existing and equal. It is also clear that where a husband has invested his capital in a business which he operates, remuneration received by him for his services to the business, as contrasted with profits derived therefrom, constitute community income. Thus, in accordance with the doctrine enunciated by the Supreme Court in *Poe v. Seaborn*, 282 U. S. 101, *United States v. Malcolm*, 282 U. S. 792, and related cases, where, as here, a husband and wife file separate returns, each is separately liable for the tax on one-half of the community income. Further, the state court, in a suit between the taxpayer and her former husband, has held that the very income involved here was community income.

2. The Commissioner cannot be required to apply toward taxpayer's deficiencies overpayments made by her former husband, since divorced, toward his taxes as shown on his separate return. A set-off of an overpayment against a deficiency can be made only where the same taxpayer is involved, unless both the taxpayer to whom the refund may be owing and the Commissioner agree that the overpayment may be applied to the deficiency of another.

In any event, it is clear that no such set-off should be made here. The rights of the taxpayer and her former husband in community property at the time of their divorce were settled by the divorce court, whose

decree was permitted to become final, after which taxpayer's petition in the state court, attempting to raise the question she is attempting to raise here, was denied upon the ground that the original divorce decree settling the question had become final, and the matter was *res judicata*. Its ruling is not only binding between the taxpayer and her former husband, but was correct. In the litigation in the state courts it was decided that the income from the former husband's services, the income involved here, was community property, hence at the time the decision was rendered taxpayer knew she had underpaid her taxes because she had reported none of this community income for the years involved, and it was equally apparent that her former husband had erroneously included the full amount thereof in his returns and hence would be entitled to a refund. As the taxpayer did not raise the question in the state court, though she could have done so timely, the question has become *res judicata* as between her and her former husband. *Tait v. Western Md. Ry. Co.*, 289 U. S. 620.

Regardless of whether the divorce decree is *res judicata* as between the taxpayer and her former husband, she is not entitled to the claimed set-off. The Tax Court correctly found that there was no evidence that the overpayment by her former husband was made out of community property. But even if community property were the source of her former husband's payments, taxpayer would not be entitled to have his overpayment applied to her taxes.



## ARGUMENT

**The Tax Court correctly held that taxpayer is liable for the payment of taxes on part of the community income received by her then husband from businesses operated by him, and that the Commissioner is not required to apply an overpayment by her former husband to deficiencies in taxpayer's separate returns for 1946, 1947, and 1948**

### A. Introduction

During 1946, 1947 and 1948, taxpayer and Harrold lived together as husband and wife, but filed separate tax returns. Harrold was the owner of two businesses from which he received \$96,258.86 in income in 1946. The Commissioner allocated 53.5 per cent of this income to a ten per cent return on Harrold's investment in the businesses and excluded this amount from the community income. The balance of the income, or \$44,760.37, was considered to be salary received by Harrold from the businesses, and was held by the Commissioner to constitute community income. Half of this community income, or \$22,380.18, was considered to be income to taxpayer. (R. 14.) In 1947 and 1948, the businesses were incorporated, and the Commissioner allocated to taxpayer's income half of the salaries received in those years in return for Harrold's personal services to the companies, or \$14,005 for 1947, and \$18,420 for 1948. (R. 17, 19.)

Taxpayer does not question the validity of these allocations, but contends instead (Br. 10-16) that she is not liable for any tax on her share of the community property, or, alternatively (Br. 16-43), that her tax liabilities should be set off against any refund which her former husband, Harrold, might obtain. We submit that neither of these contentions is valid.

**B. Taxpayer is liable for the tax on part of the income received from the businesses**

Section 161a of the Civil Code of California (Deering, 1949), *supra*, was amended in 1927 to provide that a wife's interests in community property during the continuance of the marriage relation are present, existing and equal. Since the 1927 amendment the community income of spouses residing in California is equally divisible, and where they file separate returns each spouse is permitted and required to return one-half thereof. *United States v. Malcolm*, 282 U. S. 792; *United States v. Merrill*, 107 F. Supp. 836 (S. D. Cal.)

The Supreme Court of California in *Harrold v. Harrold*, 43 Cal. 2d 77, 271 P. 2d 489, 491,<sup>1</sup> held that where the husband here invested his capital in a business which he operated, remuneration received by him for his services to the business, in contrast to the profits derived from the business, constituted community property. This is fully in accord with the other decisions of the state courts of California and of this Court. *Shea v. Commissioner*, 81 F. 2d 937 (C. A. 9th); *Devlin v. Commissioner*, 82 F. 2d 731 (C. A. 9th); *Pedder v. Commissioner*, 60 F. 2d 866 (C. A. 9th); *Pereira v. Pereira*, 156 Cal. 1, 7, 103 Pac. 488, 491; *Estate of Gold*, 170 Cal. 621, 151 Pac. 12; *Estate of Caswell*, 105 Cal. App. 475, 481, 288 Pac. 102, 104; *Witaschek v. Witaschek*, 56 Cal. App. 2d 277, 281-282,

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<sup>1</sup> See also the decisions of the District Court of Appeals in this case which further determined taxpayer's share of the community property and earnings: 100 Cal. App. 2d 601, 224 P. 2d 66; 117 Cal. App. 2d 664, 256 P. 2d 626; 261 P. 2d 800; and 127 Cal. App. 2d 582, 274 P. 2d 183.

132 P. 2d 600, 603; *Logan v. Forster*, 114 Cal. App. 2d 587, 599-600, 250 P. 2d 730, 737. Cf. *Boland v. Commissioner*, 118 F. 2d 622 (C. A. 9th); *Todd v. Commissioner*, 153 F. 2d 553 (C. A. 9th), remanding 3 T. C. 643, rehearing denied, 153 F. 2d 558, original findings affirmed on remand, 7 T. C. 399, affirmed 165 F. 2d 781.

Hence, the Tax Court was clearly correct when it held that since taxpayer and her husband filed separate returns each spouse was separately liable for the tax on one-half of the community income.<sup>2</sup> *Poe v. Seaborn*, 282 U. S. 101; *United States v. Malcolm*, *supra*, *Boland v. Commissioner*, *supra*; *Sherman v. Commissioner*, 76 F. 2d 810 (C. A. 9th); *Hunt v. Commissioner*, 22 T. C. 228; *Sutor v. Commissioner*, 17 T. C. 64; *Dunn v. Commissioner*, 3 T. C. 319. See, *Stewart v. Commissioner*, 95 F. 2d 821 (C. A. 5th). See also, *Hunt v. Commissioner*, *supra*, where the Tax Court stated (p. 230):

For purposes of Federal income taxation, each spouse is equally liable for payment of the tax on his or her respective equal share of the community income. *United States v. Malcolm*, 282 U. S. 792 (1931); *Poe v. Seaborn*, 282 U. S. 101 (1930). This liability is fixed and definite. It is not a means of splitting income which may be voluntarily chosen or elected to

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<sup>2</sup> The fact that taxpayer and Harrold entered into a separation agreement in 1945 is of no consequence, since the parties to this agreement subsequently became reconciled, and during the years involved herein, they lived together as husband and wife. Consequently, amounts earned by Harrold during the period of reconciliation would constitute community income. *Mundt v. Connecticut Gen. Life Ins. Co.*, 35 Cal. App. 2d 416, 95 P. 2d 966; *Toomey v. Toomey*, 13 Cal. 2d 317, 89 P. 2d 634.

minimize taxes. The wife may not, at her option, return one-half of the community income; she must do so. See *Paul Cavanagh*, 42 B. T. A. 1037 (1940), affirmed on another issue 125 F. 2d 366 (C. A. 9, 1942). Her liability for tax ceases only when her interest in the community income ceases. The time when that interest comes to an end is determined by California law. *Poe v. Seaborn*, *supra*.

**C. The Commissioner cannot be required to apply an overpayment by taxpayer's former husband in his separate returns to taxpayer's deficiencies in her separate returns for the same years**

Section 322 (a) of the Internal Revenue Code of 1939, *supra*, provides that where there has been an overpayment of a tax, the amount of such overpayment shall be credited against any tax then due from the taxpayer, and any balance shall be refunded to the taxpayer. This right of set-off has been strictly limited by numerous decisions which hold that a set-off of an overpayment and a deficiency can be made only where the same taxpayer is involved, unless both the taxpayer to whom the refund may be owing and the Commissioner agree that the overpayment may be applied to the deficiency of another taxpayer. *Edmonds v. Commissioner*, 90 F. 2d 14 (C. A. 9th); *Claire v. United States*, 34 F. Supp. 1009 (C. Cls.); *Krug v. United States*, 18 F. Supp. 242 (C. Cls.); *Gruy v. Commissioner*, 42 B. T. A. 1279, 1287; *Perine v. Commissioner*, 22 B. T. A. 201; *Vayssie v. Commissioner*, 8 B. T. A. 587. Cf. *Huntington Nat. Bank v. Commissioner*, 90 F. 2d 876, 879-880 (C. A. 6th); *Wynne v. Commissioner*, 77 F. 2d 473 (C. A. 5th); *Meyers v. Commissioner*, 21 T. C. 331, 347; *Green v.*

*Commissioner*, 7 T. C. 263, 277-278; *Masterson v. Commissioner*, 1 T. C. 315, 328.

Nevertheless, taxpayer contends (Br. 10-12), that her former husband, as well as the community property itself, is personally liable for the taxes shown on both returns since he was manager of the community property. We submit that the answer to this question is immaterial to the issue presented here. Whatever may be the liability of the husband as long as the community exists, this does not affect the former husband's rights to his overpayment involved here. In the instant case the rights of the taxpayer and her former husband in the community property at the time of their divorce were settled by the divorce court, whose decree was permitted to become final before taxpayer attempted to raise the question which she seeks to raise here. At the time that decision was rendered taxpayer knew that she had underpaid her taxes for the years involved here because she had reported no community income for those years. It also seems clear that at that time it was apparent that the former husband had included the full amount of the community income in his returns, and therefore was entitled to a refund. Hence, taxpayer could have and should have raised the question timely in the state court which she presently attempts to raise here. As she failed to do so, the question has become *res judicata*. *Tait v. Western Md. Ry. Co.*, 289 U. S. 620. Indeed, the taxpayer untimely attempted to reopen the divorce decree in order to raise substantially the same question which she attempts to raise here,

and the state court held that the matter was *res judicata* between her and her former husband.

While the cases cited by taxpayer on the set-off question are not applicable because the rights between taxpayer and her former husband here have been determined in the state court divorce proceedings, we submit that they can be distinguished. For example, the decision in *Clayton v. United States*, 44 F. 2d 427 (C. Cls.), was predicated upon the ground that where the spouses had filed joint returns the Commissioner could credit the overpayment by one of the spouses to the account of the other. Likewise in *Lattimore v. United States*, 12 F. Supp. 895 (C. Cls.), a joint return was filed.

Nor is *Marshall v. United States*, 26 F. Supp. 474 (C. Cls.), applicable herein. In that case the wife had consented that her tax payment could be applied to the husband's tax. She later withdrew her consent.

The majority of the Court of Claims believed that the case should be decided upon the ground that the wife was not entitled to a refund since the Commissioner correctly had cancelled the overassessment in her favor, and that she had not overpaid her tax. The majority disagreed with Judge Littleton's concurring opinion. This disagreement is clearly demonstrated by the decision of *Claire v. United States*, *supra*, where the Court of Claims held that where the spouses had filed separate returns, and one spouse overpaid his tax, there could not be any set-off between a husband and wife's accounts in the absence of an agreement, *although both returns included com-*

community income. See also, *Edmonds v. Commissioner*, *supra*.

Both *Matter of Ryan* (S. D. Cal.), decided December 13, 1949 (1951 C. C. H., par. 9493), and *Matter of Rogers* (S. D. Cal.), decided October 18, 1951 (1951 C. C. H., par. 9495), relied upon by taxpayer (Br. 10-12), are distinguishable. In *Matter of Ryan* the District Court found:

All of the income reported in their separate returns by Mr. and Mrs. Ryan for the year 1945 was post-1927 type California community income of the spouses, and was derived partly from the husband's services and in part from assets of the same community type directly traceable to his services. No partnership between the spouses existed. All of the assets of the bankrupt estate are of the same community type. The claims of the general creditors herein were contracted by Mr. Ryan for, on behalf of, and in connection with, the community enterprise; and the community assets of the estate are insufficient to pay such creditors in full.

\* \* \* \* \*

The Court further finds that no Federal income tax returns for the year 1945 were filed by the spouses until after the commencement of these bankruptcy proceedings, and neither spouse paid any part of the Federal taxes upon the income received in said year.

The court then held "that 100% of the community property is liable for the taxes upon said half of the 1945 income reported in Mrs. Ryan's return and

assessed in her name.” In *Matter of Rogers* the referee found:

III. That all the income reported by George J. and Rose Rogers in their separate returns for the years 1947 [and 1948] was post 1927-type California community income of the spouses and was derived partially from the husband’s services and in part from the assets of the same type of community property.

IV. All the assets of this estate are of the same type of community property.

The referee also found that the spouses filed a joint return for 1948. The referee then held “that all of the community property of the spouses is liable for the taxes reported by Rose Rogers in her separate return for the year 1947 and assessed in her name,” and that the bankrupt estate is indebted for the taxes of both spouses for 1947 and 1948. Thus, it is clear that both of these cases involved the right to collect the taxes of spouses, who were at the time spouses, out of the community property of both, which is a far different situation from that of the present case.

*Preston v. Commissioner*, 21 B. T. A. 840, is not applicable to the facts of the present case. In *Preston* the wife did not have any separate income, and the husband actually paid both his and his wife’s taxes out of the community income. There had been no divorce and settlement of rights in the community property. That case held nothing more than that under its facts (p. 849) “the husband should be allowed credit for the total amount of tax paid on the community income return by both spouses, to the ex-



tent that such payment has not been refunded or otherwise credited.” If the case holds anything more than this, that a husband and wife who file separate returns should be allowed a set-off of their separate tax liabilities, the decision is wrong.

The decision of *Stone v. White*, 301 U. S. 532, relied upon by taxpayer (Br. 27-29), is not applicable here. In the first place numerous decisions have made it clear that the Tax Court does not have any equity jurisdiction. *Commissioner v. Gooch Co.*, 320 U. S. 418. See *Rothensies v. Electric Battery Co.*, 329 U. S. 296, 303; *Mohawk Petroleum Co. v. Commissioner*, 148 F. 2d 957, 959 (C. A. 9th); *Babcock & Wilcox Co. v. Pedrick*, 212 F. 2d 645, 649 (C. A. 2d); *Hutchings-Sealy Nat. Bank v. Commissioner*, 141 F. 2d 422 (C. A. 5th); *Lincoln Electric Co. v. Commissioner*, 162 F. 2d 379 (C. A. 6th); *Fisher v. Commissioner*, 149 F. 2d 540 (C. A. 7th); *Gillespie Trust v. Commissioner*, 21 T. C. 739, 742. Secondly, the facts of the *Stone* case differ from those of the present case. There the tax was paid by the trustees, although the tax should have been paid by the beneficiaries. The Supreme Court permitted a set-off on the ground that any refund to the trustees would have inured to the beneficiary and would have enabled her to escape a tax she should have paid.

Since the Tax Court does not have equity jurisdiction, and it is impossible to obtain jurisdiction over the former husband in this proceeding, its decision would not be binding upon the former husband, especially in view of the state court's rulings. Similarly,

if the Commissioner refused to turn over the overpayment to the former husband, the wife could not be made a party to his action for refund. Hence, the Government in neither case could be protected. Clearly, the rights of the taxpayer, if any, in the former husband's overpayment cannot be decided here, but was properly decidable and decided in the prolific litigation between taxpayer and her former husband in the state court forum.

#### CONCLUSION

The decision of the Tax Court is correct and should be affirmed by this Court.

Respectfully submitted.

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JANUARY, 1956.

No. 14697

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United States  
Court of Appeals  
for the Ninth Circuit

---

KETHEL OSBORNE, Appellant,

vs.

E. B. SWOPE, Warden, United States Penitentiary,  
Alcatraz, California, Appellee.

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Transcript of Record

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Appeal from the United States District Court for the Northern  
District of California, Southern Division

FILED

JUL 11 1955

PAUL D. GORDEN, CLERK



No. 14697

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United States  
Court of Appeals  
for the Ninth Circuit

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KETHEL OSBORNE, Appellant,

vs.

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District of California, Southern Division



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States District Court for the North-  
ern District of California

No. 33856

KETHEL OSBORNE, No. 1055,  
Petitioner Pro. Per.,

vs.

E. B. SWOPE, Warden, U. S. Penitentiary, Al-  
catraz, California, Respondent.

### PETITION FOR WRIT OF HABEAS CORPUS

Comes now Kethel Osborne herein after called the petitioner respectfully moves this honorable court to issue a writ of habeas corpus requiring the respondent herein to produce the petitioner before this court and show cause why the petitioner should not be released forthwith from the illegal restraint of his liberty by the respondent.

In support of his petition the petitioner states as follows:

1. That he is a citizen of the United States.
2. That he is of legal age.
3. That he is presently confined in the United States Penitentiary at Alcatraz, California.
4. That he is confined under the color of a commitment from the judge advocate general of the Army, Commitment No. 365832.
5. That this commitment is promulgated on a conviction in violation of the uniform code of military justice, Art. 125, Sodomy; and 128, assault by a general court martial.

6. That petitioner is serving a sentence of eight years at hard labor entered on June 9, 1953.

7. Petitioner is confined in the United States Penitentiary, Alcatraz, California, which is within the jurisdiction of this court.

8. Petitioner proceeding pursuant to Title 28 USCA Sec. 2241, habeas corpus statute.

9. Your petitioner before applying to this court for a writ of habeas corpus has exhausted all legal remedies that are available to him as provided by Art. 73 and 67, U.C.M.J., M.C.M., 1951, and as required by the Federal Statute giving this court full jurisdiction over petitioner, for granting the issuance of a writ of habeas corpus pursuant to Title 28 Section 2241, habeas corpus statute. And as petitioner presents jurisdictional contentions, this court has full jurisdiction to determine the issue whether the issuance of a writ of habeas corpus should be granted.

#### Brief Statement of Case

1. Petitioner was tried by a general court martial at the branch United States disciplinary barracks at Lompoc, Calif., on June 9, 1953. The specifications was Sodomy and Assault in violation of the uniform code of Military Justice herein referred to as U.C.M.J.

2. The alleged offenses is to have taken place on April 30, and May 1, 1953, petitioner pleaded not guilty, petitioner was found guilty of all charges and specifications on June 9, 1953 by a General Court Martial, C.M. 365832.

3. Petitioner was placed incommunicado on May

1, 1953, petitioner was informed of the charges against him on May 12, 1953 while still incommunicado, the charges was read and served on petitioner by Major Thomas M. Love Supr. of Prisoners of the branch United States Disciplinary Barracks, Lompoc, Calif.

4. Charges was forwarded with recommendations as to disposition by Col. Harry L. Phillips, Commanding officer of the Branch United States Disciplinary Barracks, Lompoc, Calif.

5. Charges was investigated by First Lt. Henry J. Ideker, 6103 ASU, Branch United States Disciplinary Barracks, Lompoc, Calif. Whom shall from herein be called Lt. Ideker.

6. Petitioner first met Lt. Ideker on the 28th of May 1953 when he called petitioner down to an office used by the Sergeant of the Guards at the United States Disciplinary Barracks at Lompoc, Calif. At the time petitioner was called down to the office by Lt. Ideker, petitioner was being kept in segregation block where petitioner was kept before and after the trial.

7. Petitioner was informed by Lt. Ideker that he had been appointed an investigating officer to investigate petitioner's case, Lt. Ideker asked petitioner if he wanted to make a statement and petitioner answered in the negative.

Petitioner asked Lt. Ideker and Major Thomas M. Love if he could write some letters of try and obtain counsel a civilian for his defense, petitioner was told he could do so as soon as he returned back to segregation block. On returning to segregation

block petitioner was told he could not write a letter and that it was an order from Major Thomas M. Love, Supr. of prisoners of the United States Disciplinary Barracks, Lompoc, Calif.

Petitioner also asked Lt. Ideker if he was going to be confronted with the witnesses against him when they would make their statements.

Lt. Ideker informed petitioner that the witnesses had already made their statements.

Petitioner asked Lt. Ideker if he could see the statements made by the witnesses against him and was informed that he could not see the statements.

Petitioner asked Lt. Ideker could he see the Medical Officer, Capt. Alfred W. Stratton attached to the hospital at the U.S. Disciplinary Barracks, Lompoc, Calif., and expert witness in petitioner's case who had performed a rectal examination on the alleged victim, Lt. Ideker informed petitioner that he had obtained a statement from the medical officer Capt. Alfred W. Stratton but the petitioner was not allowed to see any of the statements.

Petitioner after leaving the segregation block became involved in more trouble and was going to be given another court martial. Petitioner was told that if he would sign a receipt for the approval of his last court martial that the petitioner would be shipped away.

Petitioner was told at the time he signed the receipt he was only letting the War Department know that the petitioner wanted to become a sentence prisoner with the approval he received from the reviewing authorities at Camp Roberts, Calif., and

did not want to wait for the ones to come from Wash.

At the time of signing the receipt, petitioner was in solitary incommunicado and was told that if he did not sign the receipt he would be court martialed for another violation of the U.C.M.J.

Upon being shipped out petitioner has petitioned the Military Court of Appeals for a granting of a review of petitioner's case petition was denied.

### Contentions

Petitioner contends that he is being restrained of his liberty without Due Process of Law specifically that the General Court Martial that tried the petitioner did not have competent jurisdiction over petitioner or over subject matter.

Petitioner contends that the reasons are as follows:

(1) That the placing of petitioner in incommunicado before and after trial was a violation of petitioner's rights under the Constitution Amend. VIII. Which states in part: "No cruel or unusual punishment shall be inflicted."

(2) That failure of the Military Court of Appeals to let petitioner appeal his case pursuant to the provisions of the Uniform Code of Military Justice Art. 6, 7, after petitioner sent a letter to the Court stating why he had not heretofore institute an appeal, petitioner's reasons are as follows:

A—I was Court Martialed on June 9, 1953 and placed incommunicado until August 3, 1953.

B—I was not advised of my rights to appeal,

petitioner was however advised by a member of the Judge Advocate office at the Disciplinary Barracks where petitioner was confined at that he the petitioner could not appeal his case and if he tried to he would be court martialed for another violation of the U.C.M.J.

C—I was not aware after discovering my rights to appeal that there was a time limit thereon.

D—I have been moved about several times in the past ten months and therefore have been in an unsettled condition. Petitioner contends that failure of the court of Military Appeals to let petitioner appeal his case pursuant to rule 30 of the United States Court of Military Appeals, Rule of practice and procedure was a denial of petitioner's rights under Art. 6, 7, U.C.M.J.

E—That failure of law officer to instruct the court on reasonable doubt prejudice to petitioner's rights. Although the member was instructed as to elements of the offense and that the accused must be presumed to be innocent until his guilt is established by competent evidence beyond reasonable doubt it has been held, that if the court is not instructed upon the meaning of the term reasonable doubt, it is prejudice to rights of an accused, C.C.A. 20 F.(2d) 376.

F—That failure of the reviewing authorities to disapprove petitioner's sentence for insufficient evidence pursuant to Art. 66 of the UCMJ was a denial of petitioner's rights under Art. 66.

G—That failure of the investigating to have petitioner present when witnesses against petitioner



gave their statements was a violation of petitioner's rights under the UCMJ and the Const. Amend. 6 and Art. 32.

H—That failure to let petitioner talk to the witnesses in his favor as required by the UCMJ Art. 32 and the Const. Amend. 6.

I—That Art. 31 was not read to the petitioner at any time during the investigation as required by the UCMJ, Art. 32.

J—That petitioner was not advised of his rights under Art. 31, UCMJ.

K—That petitioner's case was not investigated in compliance with Art. 32 UCMJ M.C.M. 1951 which states in part: "No charges or specifications shall be referred to a General Court Martial for trial until a thorough and impartial investigation of all the matters set forth therein has been made, this investigation shall include as to the truth of the matters set forth in the charge, and the accused shall be advised of the charges against him and of his rights to be represented at such investigation by counsel, upon his own request he shall be represented by civilian counsel if provided by him, or Military counsel of his own selection if such counsel be reasonably available, or by counsel appointed by the officer exercising General Court Martial jurisdiction over the command and full opportunity shall be given to the accused to cross-examine witnesses against him if they were available and present, anything he may desire in his own behalf either in defense or mitigation, and the investigating officer

shall examine available witnesses requested by the accused.

That petitioner was not given the opportunity to obtain Military counsel of his own selection.

Petitioner contends that these requirements are mandatory and indispensable requisites, these requirements are so mandatory that the Congress has enacted an article in the Uniform Code of Military Justice to punish any person who fails to comply with any provision of Code regulating the proceedings before or after trial.

That Art. is Art 98 of the Uniform Code of Military Justice which states:

“Any person subject to this code who is responsible for unnecessary delay in the disposition of any case of a person accused of an offense under this code, or knowingly and intentionally fails to enforce or comply with any provision of this regulating the proceedings before or after trial of an accused, shall be punished as a court martial may direct.”

Petitioner contends that if the required requisites are not complied with a court martial is without jurisdiction to try an accused or the subject matter, the jurisdiction of a court martial depends upon compliance with the statutory regulations and Constitution provisions that govern them.

### Argument and Memorandum of Law

(1) The jurisdiction of a court martial does not depend upon where an offense is committed or whether the accused is member of the Armed

Forces, there jurisdiction is condition on indispensable requisites and statutory regulation and constitutional provisions that govern them, especially due process of law, Amend. V and Art. 32-34, of the U.C.M.J. The nature of a court martial is described in *McClaghry vs. Dering* 186, U.S. 49, 62, 22, S.Ct. 786, 791, 46 L.Ed. 1049; as follows, "A court martial is a creature of statute and as a body or tribunal it must be convened and constituted in entire conformity with the provision of the statute or it is without jurisdiction." Citing Justice Waite, in *Runkle vs. United States*, 122 U.S. 543, 555, 7 S.Ct., 1141, 30 L.Ed. 1167: "A court martial organized under the laws of the United States is a court of special and limited jurisdiction, such is also the effect of the decision in *Wise vs. Withers*, 3 Cranch 331, 2 L.Ed. L57. To give effect to the sentence of a court martial it must appear that the court had jurisdiction and that all the statutory regulations governing its proceedings had been complied with, citing *Marshall in ex parte Watking* 3 Pet., 193, 209, 7 L.Ed. 650, 655; *Dynes vs. Hoover*, 20, How. 65, 80, 15, L.Ed. 838; *Mills vs. Marten*, 19, John, N.Y. 7-33; *Anthony vs. Hunter*, 71 F. Supp., 823:

Petitioner contends that due process of law in a Military tribunal is that prescribed in the Military Code enacted by the Congress, and regulations authorized by the President thereunder, the accused must be given a fair opportunity to prepare his defense, for the rights of an accused is fundamental rights and a person is unlawfully restrained of his

liberty when he is deprived of some right he is lawfully entitled to under the Constitution of the U. S.

Petitioner contends that failure of a court martial to comply with the mandatory articles deprives it of jurisdiction to try an accused, which may be acquired only by following the Mode designated by the statute, for the purpose of a pretrial investigation is to prevent trial on insufficient evidence and to protect an accused from unfounded and trivial charges and to give him an opportunity of probing into the charges against him and to uncover evidence which might lead to his ex culpation, citing, *Henry vs. Hodges* 76 F.Supp. 968;

It is for these reasons and the allegations that has been set forth, that petitioner prays that a Writ of Habeas Corpus be issued and the relief be granted to petitioner thereunder by this Honorable Court who has the General jurisdiction and is charged with the responsibility of inquiring into the legality of the detention of an accused.

### Conclusion of Petitioner

It has been well established that the Military court that imposed sentence on petitioner, did not have jurisdiction over petitioner or the subject matter and that petitioner is being deprived of his liberty by virtue of a commitment made in violation of petitioner's Constitutional rights of due process of law.

Therefore petitioner prays that this honorable court will order the respondent to show cause why

petitioner should not be released forthwith from his  
illegal restraint by respondent.

Respectfully submitted,

/s/ KETHEL OSBORNE,

Petitioner pro per

Duly Verified.

[Endorsed]: Filed July 7, 1954.

In the United States District Court for the Northern District of California, Southern Division

Civil No. 34217

KETHEL OSBORNE,

Petitioner,

VS.

E. B. SWOPE, Warden,

Respondent.

# PETITION FOR WRIT OF HABEAS CORPUS

Comes now K. Osborne, hereinafter called the petitioner who respectfully moves this honorable court to issue a writ of habeas corpus, requiring the respondent herein to produce the body of petitioner before this court on the 9th day of November, 1954, to show cause why the petitioner should not be released forthwith from the illegal restraint complained of hereinafter, verified under oath, to-wit:

1. That petitioner is in the custody of the re-

spondent above named, restrained of his liberty at U.S.P., Alcatraz, Calif., under color of a commitment issued from the Judge Advocate General of the U. S. Army, Commitment No. 365832; that petitioner was unable to obtain a copy of the commitment from the respondent; that this court has jurisdiction under 28 U.S.C. 2241, et seq.

2. That petitioner before applying to this court for the writ has exhausted his remedies provided by Art. 73 and 67, U.C.M.J. (1951); that this is the second application to this court for the writ, but is based upon new and distinct grounds.

3. That the said restraint and imprisonment are illegal and their unlawfulness consist in the following Facts and Circumstances, and not otherwise, to-wit:

#### Allegation I.

That the judgment and commitment are void and the General Court Martial board's judgment was without jurisdiction because a member of that court had threatened petitioner prior to trial, promising to find him guilty, irrespective of the evidence: That such action was of such a nature as to deprive the petitioner of due process as guaranteed by the United States Constitution (See: Exhibit A, annexed hereto and made a part hereof.)

Wherefore, your petitioner respectfully prays that the writ issue as prayed.

/s/ KETHEL OSBORNE,  
Petitioner

I, Kethel Osborne, being duly sworn according to law, declare that I am the plaintiff herein, that all the facts as alleged are true as to my knowledge and belief, so help me God.

/s/ KETHEL OSBORNE

United States of America,  
Northern District of California,  
Southern Division—ss.

Subscribed and sworn to in my presence this 19 day of October, 1954.

[Seal]        /s/ J. B. LATIMER,  
Associate Warden authorized by the Act of Feb. 11,  
1938, to administer oaths.

### Certificate of Service

I hereby certify that a copy of the hereto annexed document and the foregoing petition were mailed this day to: The United States Attorney, of the court above entitled.

/s/ KETHEL OSBORNE, Petitioner

### EXHIBIT "A"

[Title of District Court and Cause.]

### AFFIDAVIT OF PETITIONER, KETHEL OSBORNE

Before me personally appeared the petitioner, above named, being duly sworn, according to law, who did depose and aver that the following is true

as to his knowledge and belief, to-wit: Affiant states that he was confined as a Military prisoner, at the United States Disciplinary Barracks, Lompoc, California, for alleged violation of the Uniform Code of Military Justice; that he does state that he was charged with violation of Article 28, U.C.M.J.; that the date was approximately on May 19, 1952.

Affiant states that he was tried before a General Court Martial Board; That affiant was found guilty and sentenced to three (3) years; that affiant was thereafter confined in the Barracks above named.

Affiant states that he had been confined in said Barracks about ten (10) months when he had an accusation made against him by T. M. Love, Super. of prisoner, who claimed that affiant had assaulted a prisoner named Herbert E. Carpenter; that this prisoner, Carpenter was a personal friend of the accuser and Captain Mark E. Kindred, who subsequently sat as a member of the Court Martial Board which tried affiant for the alleged assault.

Affiant states that on or about June 4, 1953, Captain Mark E. Kindred came to the Disciplinary Barracks to interrogate affiant about the alleged crime; that during the course of the conversation, at which no other persons were present, Captain Mark E. Kindred became enraged when affiant told him that it was Carpenter, the other prisoner, who had assaulted him, instead of vice versa; that Captain Mark E. Kindred shouted: That's a Goddamned lie! You can't tell me that kind of bullshit; that affiant protested and warned the Captain that his actions



were of such a nature as to hold court on the spot and that he was innocent no matter what the Captain believed. That as a result of the argument, Captain reached out and grabbed affiant by the throat and affiant was choked until he nearly became unconscious; that he feebly struck out to protect himself; that the Captain's rage was beyond control; that he loosened his grip and pointed an accusing finger at affiant and screamed: You black son of a bitch, the last time I was on the Board, I recommended that you get a light sentence, but, this time I'll fix you. I'm telling you right now that I'll be on this next Board and I'll find you guilty, no matter what kind of evidence you dig up. I'll see that you get the maximum; that the Captain continued to abuse and threaten with dire consequences and departed.

Affiant states that the conversations and threats are reported as accurately as memory serves; that all this occurred on or about June 4, 1953; that on June 9, 1953, affiant was put on trial; that he raised a vigorous defense, but true to his promise, Captain did in fact vote to viciously find the defendant guilty and recommended the maximum sentence; that such threats before trial and their subsequent fulfilment was contrary to law and justice. Further affiant sayeth not.

/s/ KETHEL OSBORNE, Affiant

United States of America,  
Northern District of California,  
Southern Division—ss.

[Seal]           /s/ J. S. LATIMER,  
Associate Warden authorized by the Act of Feb. 11,  
1938 to administer oaths.

[Endorsed]: Filed November 17, 1954.

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[Title of District Court and Cause.]

### ORDER TO SHOW CAUSE

Good cause appearing therefor and upon reading the verified petition on file herein;

It Is Hereby Ordered that E. B. Swope, Warden of the United States Penitentiary at Alcatraz, State of California, appear before this Court on the 3rd day of December, 1954, at the hour of 9:30 a.m. of said day, to show cause, if any he has, why a writ of habeas corpus should not be issued herein, as prayed for, and that a copy of this order be served upon the said Warden of the United States Penitentiary at Alcatraz, State of California, by mail and that a copy of the petition and this order be served upon the United States Attorney, his representative herein.

Dated: November 30, 1954.

/s/ OLIVER J. CARTER,  
United States District Judge

[Endorsed]: Filed November 30, 1954.

[Title of District Court and Cause.]

## RETURN TO WRIT OF HABEAS CORPUS

Comes now E. B. Swope, Warden of the United States Penitentiary at Alcatraz, California, through his attorneys Lloyd H. Burke, United States Attorney for the Northern District of California, and Richard H. Foster, Assistant United States Attorney, and for cause why a writ of habeas corpus should not issue, shows as follows:

### I.

That petitioner is confined in the United States Penitentiary at Alcatraz, California, under and by virtue of the commitment of a General Court Martial approved on the 15th day of September, 1953.

### II.

That petitioner moved the United States District Court for the Northern District of California for a writ of habeas corpus on July 7, 1954 in Civil No. 33856.

### III.

That United States District Judge O. D. Hamlin on August 19, 1954, ordered that the petition for a writ of habeas corpus in Civil No. 33856 be denied.

### IV.

That the petition for a writ of habeas corpus in the above entitled case presents no new ground not heretofore presented and returned by the United

States District Court for the Northern District of California on the prior application for a writ of habeas corpus in Civil No. 33856, and pursuant to Section 2244 of Title 28 United States Code the petition for habeas corpus should be denied.

V.

That petitioner did not petition for a grant of review as prescribed by Article 67(c) of the Uniform Code of Military Justice within 30 days after receipt of the decision of the Board of Review.

VI.

That the grounds urged by petitioner for a writ of habeas corpus do not show that the court martial by which he was tried was without jurisdiction. *Burns vs. Wilson*, 346 U.S. 147; *Humphrey vs. Smith*, 336 U.S. 695; *Hunter vs. Wade*, 169 F.2d 973; *Ex parte Benton*, 63 F.Supp. 808 (D.C.N.D. Cal., Goodman, J.).

Wherefore, respondent prays that the writ of habeas corpus be denied and the order to show cause discharged.

Dated: December 10, 1954.

LLOYD H. BURKE,

United States Attorney

/s/ By RICHARD H. FOSTER,

Asst. U. S. Attorney,

Attorney for Respondent

A copy of the foregoing Return was mailed today

to petitioner, Kethel Osborne, U. S. Penitentiary, Alcatraz, California.

Dated: December 10, 1954.

/s/ R. H. FOSTER

[Endorsed]: Filed December 10, 1954.

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[Title of District Court and Cause.]

### ORDER

Kethel Osborne filed a petition for habeas corpus alleging in substance that a member of the Court Martial which tried him was biased and prejudiced. The allegations of the return to the order to show cause heretofore issued by this Court were not traversed and will be accepted as true. 28 U.S.C. 2248. The return establishes that Osborne has heretofore filed a petition for habeas corpus before this Court; that the petition for a writ of habeas corpus presents no new grounds not heretofore presented on the prior application for a writ of habeas corpus; that United States District Judge O. D. Hamlin of this Court on August 19, 1954 ordered that the prior petition for a writ of habeas corpus be denied (Civil No. 33856), and that petitioner did not petition for a grant of review as prescribed by Article 67(c) of the Uniform Code of Military Justice within 30 days after receipt of the decision of the Board of Review.

It appearing that the legality of Osborne's detention has been determined by a Judge of this

Court on a prior application for a writ of habeas corpus and that the petition presents no new ground not therefore presented and determined, and being satisfied that the end of justice will not be served by further inquiry, and further finding that the claim of bias and prejudice is mere error which does not go to the jurisdiction of the Court Martial by which petitioner was tried, therefore, pursuant to Section 2244 of Title 28 United States Code and under the authority of *Burns vs. Wilson*, 346 U.S. 147; *Humphrey vs. Smith*, 336 U.S. 695; *Hunter vs. Wade*, 169 F.2d 973 and *ex parte Benton*, 63 F.Supp. 808,

It Is Ordered that a writ of habeas corpus in the above entitled case be, and the same is, denied, and the order to show cause heretofore issued be, and the same is, discharged.

Dated: December 22, 1954.

/s/ LOUIS E. GOODMAN,

United States District Judge

[Endorsed]: Filed December 22, 1954.

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[Title of District Court and Cause.]

## PETITIONER'S ANSWER AND TRAVERSE

Your petitioner has today been served with copy of the government's Return to the petition for writ of habeas corpus heretofore filed and your petitioner denies the allegations therein in each and every respect and he now refers to the pleadings

heretofore filed with the same force and effect as that they were incorporated herein. The petitioner will present facts and evidence at the hearing.

/s/ KETHEL OSBORNE,  
Petitioner

United States of America,  
Northern District of California,  
Southern Division—ss.

I, Kethel Osborne, hereby swear that I have read the contents of the above answer and traverse and that the contents therein are true as to my knowledge and belief.

/s/ KETHEL OSBORNE, Affiant

Subscribed and sworn to before me this date:  
21st December, 1954.

[Seal]        /s/ J. B. LATIMER,  
Associate Warden authorized by the Act of Feb. 11,  
1938 to administer oaths.

Proof of Service: I hereby swear that a copy of the foregoing was mailed today to United States Attorney, of the above entitled Court.

/s/ KETHEL OSBORNE, Petitioner

[Endorsed]: Filed December 23, 1954.

Court Clerk, U. S. District Court,  
San Francisco, Calif.

Jan 16, 1955

Re: Civil No. 34217

Sir:

Please submit this letter to the Court as an informal motion to vacate the order dated Dec. 22, 1954, denying a Petition for a writ of habeas corpus.

I rely on the reason in the traverse mailed to the Court dated Dec. 21, 1954, and the following facts. The reason I did not answer the government's return was because due to a minor infraction of the institution's rules I was placed in the solitary confinement block and was therefore unable to answer the government return.

I am sincerely yours,

/s/ KETHEL OSBORNE

Respectfully submitted.

P.S.—In addition I submit the following reason why the writ should be granted.

(1) That the prosecution denied petitioner due process of law in that the army prosecutor knowingly used perjured testimony to deprive petitioner of his freedom.

I hereby swear that all I state is true.

/s/ KETHEL OSBORNE



Sworn to before me this 17th day of January,  
1955.

[Seal]            /s/ P. R. BERGEN,  
Associate Warden authorized by the Act of Feb. 11,  
1938 to administer oaths.

[Endorsed]: Filed January 20, 1955.

In the United States District Court for the Northern District of California, Southern Division

No. 34217

KETHEL OSBORNE,                      Petitioner,

VS.

E. B. SWOPE, Warden, Respondent.

ORDER DENYING MOTION TO VACATE OR-  
 DER DENYING PETITION FOR HABEAS  
 CORPUS

Petitioner moves to vacate the Court's order of December 22, 1954, denying his petition for habeas corpus and discharging an order to show cause previously issued. The ground of the motion is that petitioner was unable to traverse the respondent's return to the order to show cause until after the Court had denied his petition because he was held in solitary confinement. However, the traverse which petitioner now has on file does no more than

deny in toto the allegations of the return, nearly all of which state matters which are of record in this Court. Thus there is nothing in the traverse which would warrant any different ruling than that made.

The entirely new ground for relief which is asserted in the motion is not properly presented by way of motion to vacate the prior order.

The motion to vacate the Court's order of December 22, 1954 is therefore denied.

Dated January 24, 1955.

/s/ LOUIS E. GOODMAN,  
United States District Judge

[Endorsed]: Filed January 25, 1955.

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[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice is hereby given that the above named petitioner appeals to the United States Appeal Court for the Ninth Circuit from the Orders of December 22, 1954 and January 25, 1955, denying a petition for a Writ of Habeas Corpus.

Dated January 31, 1955.

/s/ KETHEL OSBORNE,  
Petitioner, pro se

### PRAECIPE

To the Court Clerk:

Sir:

You will please take notice that I herewith sub-

mit the necessary papers to prosecute an appeal and this is to inform you that you will receive the \$5.00 fee within a matter of 15 days. You will please hold these papers until the money arrives and then you will file same.

Dated: January 31, 1955.

Respectfully submitted,

/s/ KETHEL OSBORNE,  
Appellant, pro se

[Endorsed]: Filed March 1, 1955.

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[Title of District Court and Cause.]

### PRAECIPE OF TRANSCRIPT OF RECORD

To: Hon. C. W. Calbreath, Clerk:

Sir:

You will please prepare and certify a Transcript of Record to be used on appeal consisting of the following records:

1. Petition for Writ of Habeas Corpus, Civil No. 33856.
2. Petition for a Writ of Habeas Corpus, Civil No. 34217.
3. Order denying Petition (No. 34217) dated December 22, 1954.
4. Order denying motion to vacate, etc., (No. 34217) dated Jan. 25, 1955.
5. Notice of Appeal, dated Jan. 31, 1955.

6. Praecept of Transcript of Record, dated Jan. 31, 1955.

7. Motion to use records on appeal without costs, dated Jan. 31, 1955, and accompanying affidavit, dated Jan. 31, 1955.

You will please send me a copy of same so that I may use it to prepare a brief.

Dated: January 31, 1955.

Respectfully submitted,

/s/ KETHEL OSBORNE,  
Petitioner, pro se

U.S. District Court

2/1/55

From Kethel Osborne, P.M.B. No. 1055, to Court Clerk.

Sir:

I am tending you this letter in order to let you know that I am appealing my case, Osborne vs. Swope, Civil No. 34217. In receiving this appeal dated Jan. 31st/55 you will notice that I contend that I am a pauper within the meaning of the statutes. It is true that at the time the appeal was dated I had in my account here at the institution the sum of \$40.00, but after I pay the \$5.00 filing fee to file my Notice of Appeal in this Court I will have \$35.00, \$25.00 of which I will have to pay to the Ninth Circuit Court of Appeal, which would then lieve me with \$10.00. I have requested that you prepare the records to be used on appeal for me, for which I will be thankful, for after paying filing fees

to both Court I will be a pauper within the meaning of the statute.

I am sincerely yours,  
Respectfully submitted,

/s/ KETHEL OSBORNE

[Printer's Note]: Transmittal Slip for \$5.00 check attached.

[Endorsed]: Filed March 1, 1955.

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[Title of District Court and Cause.]

**MOTION TO USE RECORDS ON APPEAL  
WITHOUT PAYMENT OF COSTS**

To: Hon. Louis E. Goodman:

Pursuant to Sections 1915 (A) and 2250 of title 28, United States Code, the petitioner moves the court for leave to use the following records on appeal without costs, relying on the affidavit annexed hereto and made a part hereof.

1. Petition for a Writ of Habeas Corpus, Civil No. 33856.
2. Petition for a Writ of Habeas Corpus, Civil No. 34217.
3. Order Denying the Petition (No. 34217), dated Dec. 22, 1954.
4. Order Denying Motion to Vacate, etc., (No. 34217) dated Jan. 25, 1955.
5. Notice of Appeal, dated Jan. 31, 1955.

6. Praecipe of Transcript of Record, dated Jan. 31, 1955.

7. Motion to Use Records on Appeal Without Payment of Costs, dated Jan. 31, 1955.

Dated: Jan. 31, 1955.

/s/ KETHEL OSBORNE,  
Petitioner, pro se

### AFFIDAVIT OF KETHEL OSBORNE

Kethel Osborne being first duly sworn says:

1. That he is the petitioner in the process;
2. That he is a citizen of the United States;
3. That he is a pauper and is unable to pay costs of having certified Transcript of Record prepared;
4. That he files in good faith;
5. That he believes that he entitled to redress;
6. That the nature of the action is an appeal.

/s/ KETHEL OSBORNE, Affiant

State of California,  
San Francisco County—ss.

Sworn to before me this 1st day of Feb. 1955.

[Seal]        /s/ J. B. LATIMER,  
Associate Warden authorized by the Act of Feb. 11,  
1938 to administer oaths.

[Endorsed]: Filed March 1, 1955.

[Title of District Court and Cause.]

### CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing documents, listed below, are the originals filed in this Court in the above-entitled case and that they constitute the record on appeal herein as designated by the appellant:

Petition for writ of habeas corpus in Cause 33856.

Petition for writ of habeas corpus in Cause 34217.

Order to show cause in Cause 34217.

Return to writ of habeas corpus in Cause 34217.

Order in Cause 34217.

Petitioner's answer and traverse in Cause 34217.

Motion to vacate order in letter form in Cause 34217.

Order denying motion to vacate order denying petition for habeas corpus in Cause 34217.

Notice of appeal in cause 34217.

Praecipe of transcript of record with letter attached.

Motion to use records on appeal without payment of costs.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 23rd day of March, 1955.

[Seal]

C. W. CALBREATH,

Clerk

/s/ By WM. C. ROBB,

Deputy Clerk

[Endorsed]: No. 14697. United States Court of Appeals for the Ninth Circuit. Kethel Osborne, Appellant, vs. E. B. Swope, Warden, United States Penitentiary, Alcatraz, California, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: March 23, 1955.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.



No. 14,697

IN THE

United States Court of Appeals  
For the Ninth Circuit

KETHEL OSBORNE,

*Appellant,*

vs.

E. B. SWOPE, Warden, United States  
Penitentiary, Alcatraz, California,

*Appellee.*

BRIEF FOR APPELLEE.

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FILED

JUL 27 1955

PAUL P. O'BRIEN, CLERK



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No. 14,697

IN THE

**United States Court of Appeals  
For the Ninth Circuit**

---

KETHEL OSBORNE,

*Appellant,*

vs.

E. B. SWOPE, Warden, United States  
Penitentiary, Alcatraz, California,  
*Appellee.*

---

**BRIEF FOR APPELLEE.**

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**JURISDICTION.**

This Court has jurisdiction of this appeal under Sections 1294(1), 2253 and 2255 of Title 28 United States Code.

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**STATEMENT OF THE CASE.**

Appellant filed a petition for a writ of habeas corpus on November 17, 1954 (Tr. 18). It was alleged in the petition that appellant was in custody of respondent by virtue of a commitment of the United States Army, No. 365832 (Tr. 14). The petition attacked the jurisdiction of the Court Martial on the

ground that "a member of that court had threatened petitioner prior to trial, promising to find him guilty, irrespective of the evidence" (Tr. 14).

On November 30, 1954, United States District Judge Oliver J. Carter issued an order to show cause directed to the then Warden of the United States Penitentiary at Alcatraz, E. B. Swope (Tr. 18). On December 10, 1954, respondent filed his return (Tr. 19). It was alleged in the return *inter alia* that petitioner had previously applied for a writ of habeas corpus on the same ground urged in the present petition (Tr. 20). It was further alleged that the petitioner did not petition for a grant of review as prescribed by Article 67(c) of the Uniform Code of Military Justice (Tr. 20). This fact was admitted by appellant in his prior petition for habeas corpus (Tr. 7, 8).

On December 22, 1954, United States District Judge Louis E. Goodman found that since the allegations of the return were not traversed, they would be accepted as true pursuant to Section 2248 of Title 28 United States Code. The Court further found that no petition for review was made pursuant to Article 67(c) of the Uniform Code of Military Justice (Tr. 21). The Court concluded that petitioner's claims did not go to the jurisdiction of the Court Martial by which petitioner was tried, and denied the petition for a writ of habeas corpus (Tr. 22).

On December 23, 1954, one day after Judge Goodman's order, petitioner filed what he termed an answer and traverse in which he generally denied the allegations of the return (Tr. 23).



On January 20, 1955, petitioner moved to vacate the Court's order of December 22, 1954, stating the reason that he had not answered the government's return was because of infractions of prison rules he was in solitary confinement prior to December 21, 1954 (Tr. 24, 25). The Court denied the motion to vacate on January 25, 1955 (Tr. 26).

On January 31, 1955, appellant appealed from the orders of December 22, 1954, and January 25, 1955 (Tr. 26).

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### QUESTIONS PRESENTED.

1. Did appellant exhaust his administrative remedies?
2. May a Court Martial judgment be collaterally attacked on the grounds that a member of the Court Martial was biased and prejudiced against the defendant?
3. Does a failure to challenge a member of a Court Martial, alleged to be biased and prejudiced, pursuant to Article 41 of the Uniform Code of Military Justice, preclude objection to the jurisdiction of a Court Martial?
4. May a Court in its discretion refuse to entertain repetitious writs of habeas corpus?
5. Did appellant adequately show that his military review was inadequate under the rule of *Burns v. Wilson*, 346 U.S. 137?

## ARGUMENT.

### I. APPELLANT DID NOT EXHAUST HIS ADMINISTRATIVE REMEDIES.

Appellant claims in his petition to have exhausted his remedies under Articles 67 and 73 of the Uniform Code of Military Justice (50 U.S.C. 654, 660) (Tr. 14). However, to require a Court to assume jurisdiction on a mere conclusion of law is improper. *Collins v. McDonald*, 258 U.S. 416, 420, 421; *United States v. Ju Toy*, 198 U.S. 253, 261. No facts are alleged by petitioner which would indicate that any application for review had been in fact made. The record indicates clearly to the contrary. In appellant's petition of July 7, 1954, appellant alleged that he had failed to apply for relief in the Court of Military Appeals within the statutory period (Tr. 7, 8). Exhaustion of administrative remedies is basic to judicial review of any administrative decision including review of judgments of Court Martials. *Hunter v. Beets*, 180 F.2d 101; *Simmons v. Hunter*, 179 F.2d 664.

Article 73 of the Uniform Code of Military Justice (50 U.S.C. 660) provides that any time within one year after approval of a Court Martial sentence extending to confinement for one year or more, the accused may petition the Judge Advocate General for a new trial on grounds of fraud on the Court. Appellant has not affirmatively alleged that he so applied. Article 73 is based on Article of War 53 (10 U.S.C. 1525). It has been held that a failure to make application for relief under this section precludes resort to habeas corpus. *Simmons v. Hunter*, supra; *McMahan v.*

*Hunter*, 179 F.2d 661, 663; *Spencer v. Hunter*, 177 F.2d 370.

By failing to allege that relief was requested under Articles 67 and 73 of the Uniform Code of Military Justice and denied under those sections, appellant has failed to allege facts necessary to the jurisdiction of the District Court. Without such a showing the District Court could not proceed. The petition was, therefore, properly dismissed for lack of jurisdiction.

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## II. APPELLANT'S CLAIM OF BIAS AND PREJUDICE DID NOT GO TO THE JURISDICTION OF HIS COURT MARTIAL.

At common law the judgment of a judge who was in fact disqualified to sit in the particular case was not subject to collateral attack. *In re Rury* (9th Cir.), 21 F.2d 881. The judgment was merely voidable and subject to attack only on appeal. *Owens v. Dancy*, 36 F.2d 882, 884.

The Supreme Court has decided that the common law rule applies in review by civil Courts of convictions in Court Martial cases. In *Swaim v. United States*, 165 U.S. 553, at 561, the defendant had challenged a member of a Court Martial pursuant to Article of War 18 (10 U.S.C. 1489) for bias and prejudice. It should be noted that this article provides that "each side shall be entitled to one peremptory challenge." The Court nevertheless held that this question could not be urged on collateral attack of the Court Martial judgment.

Here, it is not alleged that the purported biased member was even challenged by the defendant at his Court Martial, but here, as there, an attempt is being made to question the jurisdiction of the Court Martial on the grounds that a member of the Court was biased and prejudiced. This Court should hold as the Supreme Court did that such a claim may not be adjudicated in a collateral action.

Appellant alleged that a certain altercation occurred between him and a member of his Court prior to the time of his trial (Tr. 16). No allegation was made that Captain Kindred was challenged by either appellant or his counsel pursuant to Article 41 of the Uniform Code of Military Justice (50 U.S.C. 616). The only case interpreting Article 41 of the Uniform Code of Military Justice or Article of War 18 upon which it was based is *Swaim v. United States*, supra. A similar provision, however, deals with the disqualification of judges of the District Court—Sections 144 and 455 of Title 28 United States Code. Under these sections the cases have held uniformly that even on appeal any defect is waived if an affidavit of bias and prejudice is not timely filed. *Eisler v. United States*, 170 F.2d 273, 277; *Hibdon v. United States*, 213 F.2d 869; *Kramer v. United States* (9th Cir.), 166 F.2d 515, 518, and cases cited in Note 3.

In the present case it does not appear that any challenge was in fact made. This Court had occasion to comment upon this situation in a case involving a claim of prejudice on the part of a United States District Judge in a habeas corpus action. In *Taylor v.*

*Swope* (9th Cir.), 179 F.2d 640, this Court said “a defendant cannot take his chances with a judge and then if he thinks that the sentence was too severe secure a disqualification and a hearing before another judge.” Appellant, like Taylor, failed to question the Court’s qualifications although, if the transaction he refers to actually occurred, aware of the facts prior to trial, he may not question them now. By failing to exercise Article 41, he has waived any disqualification and consented to the trial by the Court Martial which convicted him. *Neil v. United States* (9th Cir.), 205 F.2d 121 and cases cited in Note 20.

---

### III. NO SHOWING HAS BEEN MADE BY APPELLANT THAT HIS MILITARY REVIEW WAS INADEQUATE.

In military habeas corpus the inquiry, the scope of matters open for review, has always been more narrow than in civil cases. *Hiatt v. Brown*, 339 U.S. 103. This is so because of the peculiar relationship between the civil and military law. *Burns v. Wilson*, 346 U.S. 137, 139-140. The only question before the Court in any case is whether the military Court had jurisdiction of the person and the subject matter of the case. *In re Grimley*, 137 U.S. 147, 150.

In the present case it is admitted that such jurisdiction existed. Appellant does not question that the Court had jurisdiction of the offense for which he was tried or that he was a person subject to military law. He merely claims that the Court could have acted improperly because one of its members allegedly had

shown an animosity towards him. The place where this question should have been litigated is in the Courts which Congress has provided for the trial and review of military cases. *In re Yamashita*, 327 U.S. 1; *Burns v. Wilson*, supra.

It is the limited function of the civil Courts to determine whether the military have given fair consideration to claims made. *Burns v. Wilson*, supra, at page 144; *Whelchel v. McDonald*, 340 U.S. 122. The *Burns* case involved claims of illegal detention, coerced confessions, denial of counsel of their choice and other serious constitutional claims. See also *Hiatt v. Brown*, supra, and *Humphrey v. Smith*, 336 U.S. 695, where serious claims of error were made. The Supreme Court, however, has decided, after reviewing the clear attempt by Congress to set up a separate hierarchy of Courts for the military, that the petitioner must show his military review was inadequate before he may resort to the civil Courts. *Burns v. Wilson*, supra, at page 146. This Court has come to the same conclusion in the recent case of *Mitchell v. Swope*, No. 14,595, decided July 6, 1955. See also Article 76 of the Uniform Code of Military Justice (50 U.S.C. 663). Here, appellant has made no claim that his military review was inadequate. No statement was made that this ground was urged to the military Courts and, by them, denied.

It should be noted that if appellant's contention is correct, and the petition here is materially different than the petition urged to Judge Hamlin, then no opportunity has ever been granted for the military

authorities to inquire into the facts. It is clear, however, that the contention urged here is merely another variation on the theme of bias and prejudice which has been urged before. Repetitious writs of habeas corpus are an abuse of the judicial process. In the case of such petitions the Court in its discretion may refuse to entertain them under Section 2244 of Title 28 United States Code. *Swihart v. Johnston* (9th Cir.), 150 F.2d 721, 722; *De Maurez v. Swope* (9th Cir.), 110 F.2d 565; *Waley v. Johnston* (9th Cir.), 163 F.2d 556.

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### CONCLUSION.

The District Court properly denied a writ of habeas corpus in the present case. The judgment below should be affirmed.

Dated, San Francisco, California,  
July 22, 1955.

LLOYD H. BURKE,  
United States Attorney,  
RICHARD H. FOSTER,  
Assistant United States Attorney,  
*Attorneys for Appellee.*





# In the United States Court of Appeals

For the Ninth Circuit

---

G. V. FEELEY, AS ADMINISTRATOR OF THE  
ESTATE OF GEORGE A. FEELEY, DECEASED,  
Appellant,

vs.

NORTHERN PACIFIC RAILWAY COM-  
PANY, A CORPORATION,  
Appellee.

---

Brief of G. V. Feeley, Administrator  
as Appellee *Appellant*

---

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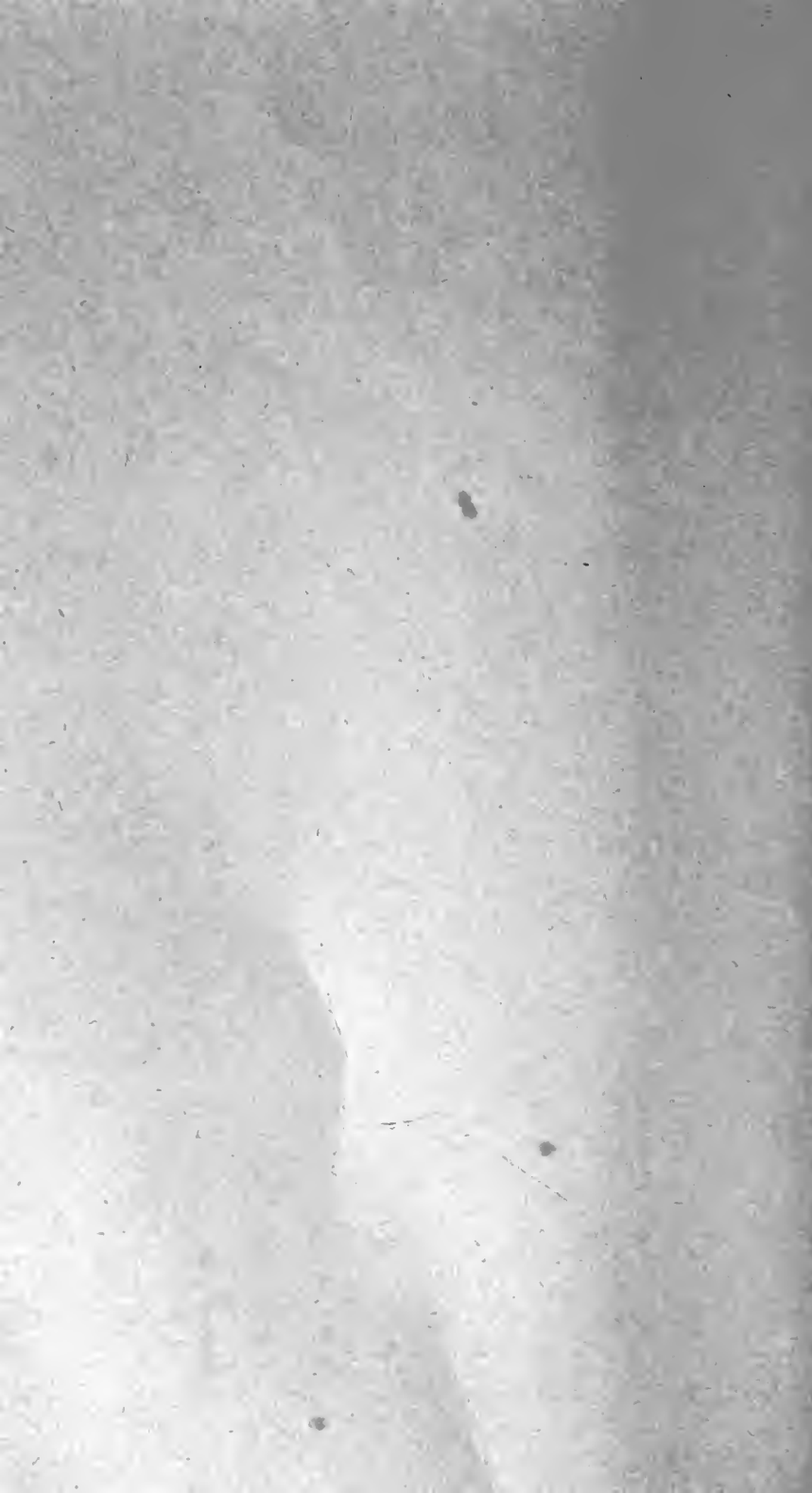
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JUN 14 1955

PAUL P. O'BRIEN, CLERK



# In the United States Court of Appeals

For the Ninth Circuit

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G. V. FEELEY, AS ADMINISTRATOR OF THE  
ESTATE OF GEORGE A. FEELEY, DECEASED,  
Appellant,

vs.

NORTHERN PACIFIC RAILWAY COM-  
PANY, A CORPORATION,  
Appellee.

---

## Brief of G. V. Feeley, Administrator as Appellee

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# In the United States Court of Appeals

For the Ninth Circuit

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No. 14698

G. V. FEELEY, AS ADMINISTRATOR OF THE  
ESTATE OF GEORGE A. FEELEY, DECEASED,  
Appellant,

vs.

NORTHERN PACIFIC RAILWAY COM-  
PANY, A CORPORATION,

Appellee.

---

Upon Appeal from the United States District Court for  
the District of Montana

---

The Brief of G. V. Feeley as Administrator of the  
Estate of George A. Feeley, Deceased

---

## JURISDICTION

This is an appeal from final judgments entered on  
the 20th day of December, 1954 in causes no. 1468 and  
1469, which were consolidated for trial and heard by

the above entitled court as companion cases. On the 17th day of January, 1955, G. F. Feeley as administrator of the estate of George A. Feeley, deceased, filed notices of appeal (tr.379). Jurisdiction of the District Court rests upon 28 U. S. C., Section 1332. The jurisdiction of this court is under 28 U. S. C. Section 1291. The court is hereby referred to the transcript at pages 1, 2, 3, 7, 9 and 11 for the pleadings verifying the existence of the jurisdiction of the United States District Court for the District of Montana, Billings Division. These actions were instituted by G. V. Feeley, a citizen of the State of Montana, as administrator of the estate of George A. Feeley, deceased, against the Northern Pacific Railway Company, a Wisconsin corporation. Cause No. 1468 was brought for the sum of \$48,000 plus costs. Cause No. 1469 was brought for the sum of \$30,160 plus costs. The total amount sought in both actions, \$78,160.

## QUESTIONS PRESENTED

Whether or not instructions on primary negligence, contributory negligence and the helpless peril theory of last clear chance can properly be submitted where plaintiff's pleadings set out a case of last clear chance based on negligent inattention and nothing more, is the basic question in this case. Further, since instructions under the theory of primary negligence, contributory negligence and helpless peril are in direct conflict with instructions on the "negligent inattention" theory of last clear chance, were these instructions, since they were in direct conflict



on a material issue, so misleading and confusing that they could have caused the jury to reach the wrong verdict and thereby prejudiced the plaintiff to such an extent that he is entitled to a new trial?

### STATEMENT

The complaints in this matter were identical in all respects except as to the relief sought. For this reason, the two cases were consolidated for trial. The theory of negligence presented in both complaints was based on the fact that although the intestate was negligent, that after his negligence and inattention was discovered, the defendants failed to use their last clear chance to avoid injuring him. In the pleadings filed by the defendant the theory of contributory negligence was pleaded even though negligence was already alleged and admitted in plaintiff's complaint. Plaintiff's case was presented on the theory of "discovered inattention" and instructions fitting plaintiff's case were properly granted, they being instructions number 3, 8, 11, 12, 13 and 14 (tr. 352, and 355 thru 358) (also see specifications of error.) However, at the same time defendant's special requests numbered 17, 21, 22, 23, 24, 25 and 26 (tr. 343 thru 349) (see also specifications of error), were also granted. These instructions were based on the "helpless peril" theory of last clear chance, primary negligence and contributory negligence. We contend that those instructions were improperly given since they were based on matters not at issue in the case and because they were in direct conflict with instructions properly submitted on behalf

of the plaintiff, and therefore confused and mislead the jury.

## SPECIFICATIONS OF ERROR

1. The Court erred in granting Defendant's Special Request No. 17 (tr. 343) for the reasons set out in the objection herein, and because the said instruction is based on the theory of helpless peril rather than mental inattentiveness and therefore confused and mislead the jury. The instruction is as follows:

"You are instructed that to make the doctrine of last clear chance applicable, three elements are indispensable, namely:

1. that George A. Feeley was in a position of peril brought about by his own negligence;

2. the actual discovery by the defendant of the perilous situation of George A. Feeley in time thereafter to avert the injuries complained of, if any; and

3. the failure of the defendant thereafter to use ordinary care to avert the said injuries.

All of these elements must concur, otherwise the doctrine has no application, and if you find from a preponderance of the evidence that any one or more of such elements is lacking, the plaintiffs cannot recover under the doctrine of last clear chance.

George A. Feeley was in a zone of safety at all times while approaching said crossing until he arrived at a point on the road after which he could not, in the exercise of reasonable care, stop before entering upon the tracks. He was in a position of

peril after he arrived at a point on the road from which he could not thereafter, in the exercise of reasonable care, stop his truck before entering upon the tracks."

### OBJECTION (tr. 361)

1. Plaintiff objects to the granting of Defendant's special request No. 17 for the reason that this instruction is misleading. This is an instruction for the helpless peril type of last clear chance, and is not applicable in its entirety to the negligent inattention theory of last clear chance.

2. The District Court erred in granting defendant's Special Request No. 19 (tr. 344 and 345) for the reason set out in the objection herein and because the instruction was incomplete and failed to consider the possibility that the tragedy could have been avoided by ringing the bell or slowing the train, the instruction therefore mislead and confused the jury.

The instruction is stated as follows:

"You are instructed that unless plaintiffs prove by a preponderance of the evidence that the trainmen in charge of the train failed to use ordinary care to avert the injuries complained of, if any, after they actually discovered that George A. Feeley had entered into a position of peril, plaintiffs cannot recover; and if you find from the evidence that after the trainmen in charge of the train discovered that George A. Feeley had entered into a position of peril, the train could not thereafter have been

stopped by the exercise of ordinary care, in time to have averted the accident, your verdicts must be for the defendant.”

OBJECTION: (tr. 361)

Plaintiff objects to the granting of Defendant's special request No. 19 for the reason this is an incorrect statement of the law: it is misleading. That fact that the train was equipped with whistle and bell should also be considered in addition to the fact that the train had brakes, whistle, and bell and signals under the control of the fireman and engineer, also under the facts it would not have been necessary to stop the train; mere slowing of the train may have saved the life of George A. Feeley.

3. The District Court erred in granting Defendants Special Request No. 20 (tr. 345) for the reason stated in the objection herein contained, said instruction being as follows:

“If you find from a preponderance of the evidence that after the actual discovery of George A. Feeley in a position of peril, if you find he was in a position of peril, the engineer in charge of said train exercised reasonable care to avert the collision with George A. Feeley, your verdicts must be for the defendant.”

OBJECTION (tr. 362)

Plaintiff objects to the granting of Defendant's special request No. 20 for the reason that the instruction is misleading; there is no mention in the instructions of the fireman or the conductor who were in a position to have averted the accident, the collision; it is an incorrect state-

ment of the law, the applicable law being what would a reasonably prudent man under the same circumstances have done. The instruction uses the words "position of peril" which is not applicable in the case of inattentive motorist, an inattentive motorist is in a situation of danger rather than a position of peril.

4. The Court erred in granting defendant's special request No. 21 (tr. 345) for the reasons set out in the objection herein and because the said instruction is based on the theory of negligence and contributory negligence and is in direct conflict with plaintiff's instructions 3, 8, 11, 12, 13, and 14, and is therefore confusing and misleading; instruction 21 is as follows:

"You are instructed that if George A. Feeley failed to exercise due care for his own safety; that is, such care as a reasonably prudent person would exercise for his own safety under similar circumstances; then George A. Feeley was guilty of contributory negligence; and if you find from a preponderance of the evidence in this case that George A. Feeley was guilty of any negligence alleged in defendant's answer or shown by the testimony contemporaneous, concurrent, continuous, and contributory with negligence of the defendant up to and producing the accident complained of, then the plaintiffs cannot recover in these actions, and your verdicts must be for the defendant, regardless of whether or not you find that the defendant itself was guilty of negligence."

## OBJECTION (tr. 362)

Plaintiff objects to the granting of Defendant's special request No. 21 on the ground it is prejudicial and is an incorrect statement of the law and does not apply to an inattentive motorist and applies only to the condition of helpless peril. The standard to be used instead of the application of the doctrine of primary negligence or contributory negligence is the rule of what an ordinary prudent man would have done or might have done under the same circumstances. Contributory negligence is inapplicable in this case, the plaintiff having admitted that the decedent was contributorily negligent, and we are concerned only with the negligent inattentive theory of the last clear chance.

5. The court erred in granting defendant's special instruction number 22 (tr. 346) for the reasons set out in the objection herein and because the instruction is based on primary and contributory negligence and is therefore in direct conflict with plaintiff's instructions 3, 8, 11, 12, and 14, therefore misleading the jury. Instruction 22 is as follows:

"You are instructed that if you find from the evidence that if George A. Feeley, had he looked and listened, ought to have heard the warnings and signals of the train, if any were given, and that if he had exercised reasonable care he would have heard said warnings and signals, if any were given, and would have seen the locomotive and heard the noise created by the rapidly moving train, in time to avoid

the accident, then and in that event your verdicts should be for the defendant.

### OBJECTION (tr. 363)

Plaintiff objects to the granting of Defendant's Special Request no. 22 for the same reasons given in their objection to special request no. 21; the instruction, as is true with defendant's special request No. 21, is misleading and is an incorrect statement of the law of the case as shown in the Union Pacific case *supra*.

6. The court erred in granting defendant's special request No. 23 (tr. 346) for the reasons set out in the objections herein and because the instruction deals with primary negligence and is in complete conflict with plaintiff's instructions 3, 8, 11, 12, 13, and 14; therefore, it is confusing and misleading to the jury. Instruction 23 is as follows:

"You are instructed that all persons driving motor vehicles upon the public highways of this state, outside of corporate limits of incorporated cities or towns, where the view is obscure, or when a moving train is within sight or hearing, shall bring said vehicle to a full stop not less than ten nor more than one hundred feet from where said highway intersects railroad tracks within this state before crossing the same, and if you find from a preponderance of the evidence that said train was moving within sight or hearing of George A. Feeley and you further find that George A. Feeley failed to bring his truck to a full stop not less than ten nor more than one hun-

dred feet from where said highway intersects said railroad tracks, and you further find from a preponderance of the evidence that George A. Feeley's failure to stop his truck proximately contributed to the injuries and death sustained by him, he is guilty of contributory negligence, and plaintiffs cannot recover and your verdicts must be for the defendant."

### OBJECTION (tr. 363)

Plaintiff objects to the granting of Defendant's Special Request No. 23 for the reason it is an incorrect statement of the law of the case; this instruction applies only to primary negligence; it is confusing and misleading to the jury; the plaintiffs have admitted that the decedent was contributorily negligent and for that reason it is confusing to the jury and not applicable, and misleading to the jury.

7. The Court erred in granting Defendant's Special Request No. 24 (tr. 347) for the reasons set out in the objections herein and because the instruction deals with a primary negligence situation and therefore is confusing and misleading in a case of last clear chance. Instruction 24 is as follows:

"You are instructed that the presence of a railroad track is of itself a warning of danger; a person approaching a railroad crossing is required to take all reasonable precautions to assure himself by actual observation that there is no danger from an approaching train;



The failure to the persons in charge of the train to keep a lookout or to give warning signals of its approach to the crossing does not relieve the traveler of the necessity of making a vigilant use of his senses to ascertain whether it is safe to proceed onto said crossing;

The traveler must use ordinary care to make his looking and listening reasonably effective, and whenever there is a zone of safety within which a traveler upon a highway may, by looking and listening, and stopping, if need be to ascertain the presence of an oncoming train, it is his duty to make his observation within such zone;

If he proceeds from a place of safety regardless of an approaching train of which he has knowledge, or if he leaves the place of safety without having made a vigilant use of his senses to discover a danger which is present and could have been seen from such place, then it will be held to be his negligence which is the proximate cause of the injury resulting from a collision, regardless of circumstances tending to show negligence on the part of the railroad operators.

When a train is at a point which is within the traveler's vision while he is in a place of safety, he will be deemed either to have seen it and proceeded regardless of the danger, or to have failed to make a vigilant use of his senses.

Therefore, if you find from a preponderance of the evidence in this case that, when George A. Feeley

was in a place of safety, the train was at a point on said track within George A. Feeley's vision and having seen the approaching train or having failed to make a vigilant use of his senses to discover the same, he entered the crossing in front of the approaching train when it was too late for the engineer in charge of said train, by the exercise of reasonable care, to avert a collision between the train and the truck which George A. Feeley was driving, plaintiffs cannot recover and your verdicts must be for the defendant."

### OBJECTION: (tr. 363)

Plaintiff objects to the granting of Defendant's Special Request No. 24 for the reason that the instruction assumes a set of facts not in evidence, it, therefore, also misleading. The instruction is inapplicable to the inattentive motorist type of last clear chance case. This instruction is an instruction to be given and which can properly be given only in a case of primary negligence situation.

8. The Court erred in the granting of Defendant's Special Request No. 25 (tr. 349) for the reasons set out in the objection herein and because the special request is an instruction on primary negligence in direct conflict with plaintiff's special requests numbered 3, 8, 11, 12, 13, and 14 and is therefore confusing and misleading, Special Request 25 being as follows:

"It was the duty of George A. Feeley to exercise due care for his own safety; that is, to look and listen and otherwise make use of his natural facilities

to discover and avoid the danger that threatened him from defendant's train that was approaching the crossing, and a special duty of care rested upon him in approaching a crossing with the presence and location of which he was thoroughly familiar.

You are further instructed that if a view of the track was obscured, or factors made the sound of an approaching train inaudible, George A. Feeley was required to take such precautions as would render sight or hearing effective, and, if necessary, to make his looking and listening reasonably effective, he was required to stop at such point as would accomplish that purpose."

#### OBJECTION (tr. 364)

Plaintiff objects to the granting of Defendant's Special Request No. 26 for the reason that it is an incorrect statement of the law as applied to the present case; the engineer and trainmen must act as reasonably prudent men when they have discovered an inattentive motorist; the instruction takes into consideration only the ordinary negligence, that is primary negligence type of case, and does not contemplate an action brought under last clear chance and particularly in a situation of negligent inattention.

9. The Court erred in granting defendant's special requests sumbered 17, 19, 20, 21, 22, 23, 24, 25, and 26 heretofore stated in specifications of error numbered 1 thru 8 because the said instructions were in direct conflict with plaintiff's special requests No. 3, (tr. 353), No. 9,

(tr. 354), No. 11, tr. (355), No. 12, (tr. 356), No. 13, (tr. 356), and No. 14, (tr. 357), defendant's said instructions being irreconcilable and having the effect of misleading and confusing the jury. Plaintiff's special requests numbered 3, 9, 11, 12, 13, and 14 are as follows: (tr. 353, 354, 355, 356, 357).

1. Plaintiff's offered instruction No. 3:

"You are instructed that the continued movement of the decedent toward the railroad crossing, a place of danger, after a warning sound is notice that he was unaware of his peril, and is enough to break the reciprocal balance of duty, and, if it can be said that he had the time to do so, puts upon the defendant the positive duty of avoiding the accident."

2. Plaintiff's offered instruction No. 9:

"If you find from a preponderance of the evidence that the fireman or conductor or any member of the train crew, at the time mentioned, was in a position where he or they could have seen plaintiff's Jeep station wagon approaching the crossing and could have seen that Mr. G. A. Feeley was inattentive and unaware of the approach of the oncoming train, these are circumstances which you may take into consideration in determining whether or not the servants of the defendant saw the said G. A. Feeley in time to have averted the injuries complained of by the plaintiff.

The law presumes that a person looking down the track in the position of the fireman and conductor,

if you find they were looking down the track, should have seen what was in plain sight to be seen.”

3. Plaintiff's offered instruction No. 11:

“Even if G. A. Feeley, the deceased, by the exercise of reasonable vigilance would have observed the danger created by the defendant's negligence, if you find that defendant was negligent, in time to have avoided harm therefrom, plaintiff may recover if the defendants knew of Mr. Feeley's situation and realized or had reason to realize that Mr. Feeley was inattentive, and therefore unlikely to discover his peril in time to avoid the harm and if defendant's servants were thereafter negligent in failing to utilize with reasonable care and competence their then existing ability to avoid harming Mr. Feeley.

In this respect, it is not necessary that the circumstances be such as to convince the defendant that the plaintiff is inattentive and, therefore, in danger. It is enough that the circumstances are such as to indicate a reasonable chance that this is the case.

Even such a chance that Mr. Feeley might not have discovered his peril would have been enough to require the trainmen to make a reasonable effort to avoid injuring him.

Therefore, if you find that there was anything in the demeanor or conduct of Mr. Feeley which to a reasonable man in the position of defendant's agents would indicate that Mr. Feeley was inattentive, and, therefore, would not or might not have discovered

the approach of the train, defendant's servants and employees are obliged to take such steps as reasonable men would think necessary under the circumstances, and if you find that they or any of them did not do this, you must find for the plaintiff."

4. Plaintiff's offered instruction No. 12:

"The court further instructs the jury that the duty of a railway company, and its operators and agents in control to control the locomotive at crossings such as the crossing at which Mr. Feeley was killed, in order to avoid collision, does not arise solely when a person is on the track, but also obtains if his danger was apparent while he was approaching the track."

5. Plaintiff's offered instruction No. 13:

"Even if you find there is no direct evidence that G. A. Feeley was actually discovered by the engineer, fireman or conductor in time to avoid the collision, this fact may still be established by circumstantial evidence.

If the circumstances indicate to you that Mr. Feeley was unaware of his danger, and that this unawareness was discovered by the engineer, fireman or conductor in time to avoid the collision or injury to Mr. Feeley, then you must find in favor of the plaintiff."

6. Plaintiff's offered instruction No. 14:

"You are instructed that if any railroad corporation within this state shall fail to have upon any locomotive in use by it in this state a bell and whistle

in fit condition for use thereon, or shall permit any locomotive to approach any railroad crossing, without causing the whistle to be sounded at a point between fifty and eighty rods from the crossing, and the bell rung from said point until the crossing is reached, it is negligent per se.

However, even if these signals might have been given as the defendant's train approached the Feeley crossing, if the engineer, conductor or fireman observed that they were not heard by Mr. Feeley, or that the train was not discovered by him in time to avoid the collision, you are instructed that it was their duty to give such additional signals as an ordinarily prudent man would deem necessary; and if you find that Mr. Feeley was unaware of the approaching train and that such additional signals were not given, and that had they been given, Mr. Feeley's death could or would have been avoided, then you must return your verdict in favor of the plaintiff."

### ARGUMENT

At the outset, it appears to be a basic proposition that instructions as a whole must be consistent and harmonious and not conflicting and contradictory. 53 Am. Jur., pages 442 and 443, contain the following statement in that regard:

"Where instructions give to the jury for their guidance contradictory and conflicting rules which are unexplained, and where following one would or might lead to a different result than would obtain by following the other, the instructions are inherently

defective. This is true although one of the instructions correctly states the law as applicable to the facts of the case, since the correct instruction cannot cure the error in the contradictory erroneous instruction. Inconsistent instructions are calculated to mislead and confuse the jury, since the jury are thereby left in doubt and without any certain guide as to the law arising upon the evidence."

It is also a well settled principle that the instructions given by the trial court should be confined to the issues raised by the pleadings. In this regard the following statement from 53 Am. Jur. 453 may be appropriate:

"The particular matters to be covered in the instructions depend upon the issues joined by the pleadings and supported by the evidence . . . indeed it is error to submit to the jury as a basis of recovery an issue not raised by, or a theory of the case finding no basis in plaintiff's pleadings, a case of action substantially different from that alleged, or questions of damages not recoverable under the pleadings."

Authority indicating that Montana is substantially in accord with these propositions is found in the following cases which seem to hold unanimously that the giving of conflicting instructions on a material issue is a reversible error.

Kelton v. Great Northern Ry. Co. 100 P. 2d 929.

Sullivan v. Metropolitan Life Ins. Co., 35 Mont. 1 88 P. 401.

Wells v. Waddell, 59 Mont. 436, 196 P. 1000.

It is our contention that the case at bar was based on one theory and one theory only, that being "The Discovered Inattention Theory of Last Clear Chance" and the introduction of any other theory into this case especially



when by its terms it is contradictory to the theory of last clear chance as set out in the complaint, is not only erroneous, but since it confuses the jury it amounts to reversible error. Plaintiff's complaint (tr. 1 thru 7 and tr. 9 thru 11) should most clearly reveal that no other theory than that heretofore stated could have ever possibly been considered in presenting this case. See also transcript at pages 4 and 5, wherein it is stated in effect that the decedent's inattention was discovered, but no effort was made by the defendant's employees to avoid injuring him. No other issue was raised; no defense based on any other theory was appropriate.

By way of illustration, we believe that the Last Clear Chance Doctrine as a whole permits recovery when the following situations are present, assuming of course at the outset, that the plaintiff was negligent:

(1) When there is discovered helpless peril (i.e., physical helplessness) of the injured person regardless of the place of injury.

(2) The undiscovered helpless peril (i.e. physical helplessness) of the injured person at the place where defendant is under a duty to keep a lookout as at railroad crossings.

(3) The discovered negligent inattention (i.e. mental obliviousness) of the injured person regardless of the place of injury.

(See 1944 Montana Law Review Spring Issue, page 12 and 13 and the Restatement of Torts, pages 479-480.)

See also:

Doichinoff v. Chicago M & St. P. Ry. Co. et al.  
51 Mont. 582, 154 Pac. 924.

to the effect that Montana permits recovery under the negligent inattention theory of last chance, i.e., a situation where a negligent plaintiff's inattention is apparent, but wherein no subsequent steps were taken to avoid injuring him after discovery of the plaintiff's peril, due to his inattention as set forth in theory No. 3, heretofore cited.

We resorted to the third theory of last clear chance heretofore cited and pursuant to the Montana authority heretofore cited in order to establish our case. And since there was no other theory to consider, we believe that no instructions should have been submitted on any other theory of last clear chance or primary or contributory negligence.

However, even though we proceeded under the theory of discovered inattention, defendant's special request No. 17 was granted containing instructions for the "helpless peril theory of last clear chance."

Under that theory it is apparent that recovery is possible only if one is discovered in a situation of physical helplessness and nothing is subsequently done to prevent his injury. This requires that the plaintiff must have been physically helpless, an allegation which was not a part of the complaint in our case (had such a situation been in existence, we would have alleged it and attempted to recover under it). However, the situation alleged in plaintiff's case was discovered mental inattentiveness, a

factual situation requiring that the mental inattentiveness be apparent to the defendant or to a reasonably prudent person. It of course becomes immediately apparent that the two situations are not to be reconciled. To require that the plaintiff be in a situation of physical helplessness to recover in a cause of action where the crux of the liability is based on apparent mental inattentiveness that may very likely place the defendant in a position of danger, is to place two entirely different factual situations before the jury for their consideration which are in direct opposition to each other. One requires physical helplessness for recovery and the other requires mental inattentiveness, the latter only being the subject of the complaints in the case at bar. However, the really serious objections pertain to defendant's special requests numbered 21, 22, 23, 24, 25 and 26, they being instructions pertaining to contributory negligence and primary negligence.

It is alleged and admitted that plaintiff was negligent, and the only real question is whether or not the defendant had the last clear chance to avoid injuring the plaintiff. Defendant's Instructions numbered 21, 22, 23, 24, 25, and 26, however, require that in order that plaintiff recover, he should not have been negligent at any time. This is obviously misleading in a case where all negligence on the part of the plaintiff is already admitted and the only question to be considered is, that notwithstanding the plaintiff's negligence and inattentiveness, did the defendant have the last clear chance to avoid injuring the plaintiff? Instructions on primary negligence improperly

submitted have been censured in other cases.

Francis v. Missouri Pac. Railroad Co. 85 S. W. 2d 915.

Defendant's special request numbered 21, pertaining to contributory negligence cannot be reconciled with any instruction on last clear chance and is clearly prejudicial. In the case of Mihelich v. Butte Electric Ry. Co. et al., a Montana case cited at 281 Pac. 540, the court states without qualification as follows:

*"A plea of contributory negligence is not a defense if the action is brought upon the theory that, notwithstanding such negligence the defendant had the last opportunity to avoid the injury and failed to exercise it. The rule of pleading in cases which do not invoke the doctrine of the last clear chance does not have any application . . . in a case, which depends entirely upon that doctrine."* (Emphasis ours.)

It would appear therefore, that the Montana courts agree that the theory of contributory negligence has no application in a last clear chance case where no other issue has been raised. More definite statements indicating that instructions on contributory negligence in last clear chance cases and in cases involving the humanitarian doctrine constitute error are found in the case of Louisville & Nashville Railroad Company Appt. vs. L. F. Johnson Admr. etc. of Reuben Harrod, Deceased, where the court states as follows:

The familiar rule is that, though the plaintiff may have been negligent, still his negligence does not bar a recovery if, after his peril has been discovered, the defendant with knowledge of his danger fails to use ordinary care for his protection . . . we therefore con-

clude that the instruction given on contributory negligence should not have been given.

155 Ky. 155, 159 S. W. 685 47 L. R. A. (N.S.) 918.

A similar rule was stated in the case of *Frances vs. Missouri Pac. Transp. Co.* Mo. App., (85 S. W. 2d 915), which held in effect that defendant in a negligence case has a right to have his theory submitted by instruction, but where a requested instruction includes primary negligence, which is improper in a case submitted solely on the humanitarian doctrine, the giving of such an instruction injects foreign and prejudicial issues and is properly refused.

The Missouri cases cited hereinafter are directly in point and offer an irrebuttable argument against permitting contributory and primary negligence instructions in cases submitted solely on the basis of last clear chance and the humanitarian doctrine.

While it is not contended that Montana has extended the Last Clear Chance Doctrine to include the Humanitarian Doctrine, the same considerations do apply to both doctrines in that in both doctrines the negligence is admitted and the cases turn on a failure to then take subsequent steps to avoid the injury in question. From the Montana case of *Mihelich vs. Butte Electric Ry. Co.* heretofore cited, it is apparent that the courts of Montana hold that where the issue is only last clear chance and nothing else, the doctrine of contributory negligence does not apply. A similar result is reached in the Missouri Cases dealing with this problem where it applies to the humanitarian doctrine.

McCall v. Thompson 155 S. W. 2d, 161, 348 Mo. 795.

White v. Kansas City Public Service Co. 149 S. W. 2d 375, 347 Mo. 895.

Dilallo v. Lynch 101 S. W. 2d 7 340 Mo. 82.

Willhauck v. Chicago R. I. & P. Ry. Co., 61 S. W. 2d 336, 332 Mo. 1165.

Silliman v. Munger Laundry Co., 44 S. W. 2d 159, 329 Mo. 235.

Schulz v. Smercina 1 S.W. 2d 113, 318 Mo. 486.

Those cases are unanimous in holding that where a case is properly submitted on the humanitarian doctrine, the question of contributory negligence is eliminated and that to submit it under such circumstances is error.

The only exception to this rule is where the case is not submitted solely on the humanitarian doctrine.

Wholf v. Kansas City C. C. & St. J. Ry. Co. 73 S. W. 2d, 195, 335 Mo. 520.

A study of these cases and particularly the reasoning therein establishes without question, the basis of the argument in this brief. This is, in substance, that in a case such as the instant case, where the only issue raised in the plaintiff's case is last clear chance, instructions on contributory negligence are unnecessary because the question of contributory negligence is not at issue, and since primary negligence instructions and contributory negligence instructions by their very nature are completely contradictory to last clear chance instructions, submitting them in a case based solely on last clear chance is erroneous and prejudicial and amounts to reversible error.

## CONCLUSION

For the foregoing reasons, it is submitted that the judgment appealed from should be reversed.

Respectfully submitted,

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# In the United States Court of Appeals

For the Ninth Circuit

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G. V. FEELEY, AS ADMINISTRATOR OF THE  
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Appeal from the United States District Court for the  
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## Appellee's Brief

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Rule 51, F.R.C.P. ....	46, 51
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# In the United States Court of Appeals

For the Ninth Circuit

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No. 14698  
CIVIL

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G. V. FEELEY, AS ADMINISTRATOR OF THE  
ESTATE OF GEORGE A. FEELEY, DECEASED,  
Appellant,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,  
A CORPORATION,  
Appellee.

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Appeal from the United States District Court for the  
District of Montana

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## Appellee's Brief

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### STATEMENT OF THE CASE

This appeal presents two basic questions:

- (1) Was the defendant appellee entitled to a directed verdict? If so, the judgment must be affirmed.

(2) Was there any reversible error in the charge?

If not, the judgment must be affirmed.

We submit first that a directed verdict should have been granted. The accident occurred in the day time at an open, country grade crossing. The weather was clear; the road dry. The crossing was heavily used by rail traffic at all hours of the day and night. Deceased had been thoroughly familiar with the crossing for over thirty years, and knew of its heavy use. For over 100 feet of approach to the crossing, deceased had an unobstructed view of the crossing itself and of the tracks to the west for over a quarter of a mile. Deceased approached in a jeep at a speed of 10 to 15 miles per hour at which his stopping distance was not less than  $14\frac{3}{4}$  ft. and not more than  $33\frac{1}{2}$  ft., or in time between 1 and 1.51 seconds from the crossing. The train at that moment was 66.37 ft. to 110.5 ft. from the crossing approaching at 45 miles per hour; it would take at least 80 feet after the brakes were applied before braking action commenced; and the train could not stop in less than 500 ft. to 680 ft. Both vehicles approached simultaneously without stopping to the crossing and the impact.

We respectfully submit that under such facts, the deceased's own negligence proximately caused the accident, and last clear chance is inapplicable. Defendant appellee was entitled to a directed verdict on the grounds set forth at pages 298 (Supplemental Transcript), 325 and 326 of the transcript. The judgment should be affirmed.

In any event, we respectfully submit that there was no reversible error in the charge to the jury.

### STATEMENT OF FACTS

There is no statement of facts in the brief of appellant. Accordingly, we shall review the evidence somewhat in detail.

#### *1. SCENE OF ACCIDENT AND UNOBSTRUCTED VIEW.*

In our statement of the case we have said that the accident occurred in the daytime at an open, country, grade crossing. An excellent picture of the crossing, of the dirt road approaching the crossing, upon which the deceased was traveling, and the view of the deceased to the right or west can be gathered from three photographs introduced in evidence consisting of Defendant's Exhibit 8, taken from a point 100 feet north of the crossing (*T. 312-313*), Defendant's Exhibit 9 taken from a point located 75 feet north of the crossing (*T. 313-314*), and Defendant's Exhibit 10 taken from a point south of the crossing, looking toward the north, and giving an accurate view of the approach road from approximately the right of way fence 75 feet north of the crossing (*T. 314-315, 317*).

An aerial photograph was likewise introduced in evidence as Plaintiff's Exhibit 3 (*T. 132*).

Finally there was introduced in evidence Plaintiff's Exhibit 1, consisting of a map of the immediate area (*T. 32*). Plaintiff testified that the objects, points and distances shown on that map, Plaintiff's Exhibit 1, were correct (*T. 48-49*). Plaintiff then put in considerable in-

formation in the map, Plaintiff's exhibit 1, and indicated that there was no foliage from the point on the map marked as No. 4 on south to the track, (*T. 126-127*), and from that No. 4 on south to the crossing, and from there west, the map was accurate (*T. 139*).

From the photographs, and the map, supplemented by the testimony of the witnesses, it appears that there were two sets of double tracks, 50 feet apart (*T. 32, 1. 23-25*), that the main line track ran substantially due east and west (*T. 36, 1. 8*), and that U. S. Highway No. 10 located south of the tracks was substantially parallel with the main line of the railroad (*T. 36, 1. 11-16*). The tracks were substantially level (*T. 62-63, T. 156*).

No. 8 was placed on Plaintiff's Exhibit 1 at the point where a barbed wire fence ran east and west paralleling the track to the north, and from No. 8 to the north track was a distance of 75 feet (*T. 45*). Four trees extending from north to south and bordering the west side of the road approaching the track from the north were numbered 1, 2, 3, and 4, respectively, with No. 4 representing the southernmost tree (*T. 44*). From No. 1 tree to the track was 257 feet, No. 3 to the track 200 feet, No. 4 to the track 176 feet (*T. 45*). The point marked AA on Plaintiff's Exhibit 1 represents the centerline of the approach road to the crossing, at the point where a road branches off into the plaintiff's home, and from that point AA to the crossing was 297 feet (*T. 35*).

The dirt road approach had no loose gravel on the surface, was packed solid, and was hard and dry. The level

of the tracks was from 3 feet to 4 feet higher than the road. The upgrade on the dirt road was gradual from a distance commencing at a point approximately 30 feet to the north of the right of way fence, and then was gradual throughout the balance of the distance up to the track (*T. 66-67, 141-142*).

Over objection, plaintiff was permitted to testify as to an experiment which he made at eye level from points on the railroad tracks to the west of the crossing of automobiles at two points on the approach road (*T. 231-238*). Even at eye level, when the plaintiff was at a point on the track 600 feet west of the crossing, an automobile was then fully visible in the approach road at the point marked AA (*T. 236*), and the court will recall that that point was 297 feet from the crossing. When plaintiff was on the tracks 819 feet west of the crossing at the point on Plaintiff's Exhibit 1 marked 00, he could then see an automobile where it had just turned south on the lane at the point marked NN on Plaintiff's Exhibit 1 (*T. 237-238*) and that point NN was in excess of 200 feet from the crossing.

It is undisputed from the testimony of the witnesses, the photographs, and the map, that from the time the deceased was at a point in excess of 100 feet north of the crossing, he at all times had an unobstructed view to the west along the tracks for over one-quarter of a mile.

**2. THE CROSSING WAS HEAVILY USED BY RAIL TRAFFIC, AND DECEASED WAS THOROUGHLY FAMILIAR WITH THE CROSSING AND ITS USE.**

Plaintiff testified that trains ran over that crossing at all hours of the day and night, that his father knew that as well as he did, his father had lived north of the tracks since 1906, had used the road and crossing frequently before the accident, as much as several times a day, and had in fact driven a mail route and operated a school bus over the same road for some years prior to the accident (*T. 139-140*).

His father was in exceptionally good health, and wore glasses only for reading, and his hearing was perfectly good (*T. 69-70*).

### 3. *PHYSICAL CONDITION OF THE JEEP.*

Plaintiff described the physical condition of the jeep as a car in first class mechanical shape; it had been overhauled recently and had new tires on it. The engine had been overhauled and the brakes were good. As far as he knew, everything was in first class operating condition on the vehicle. (*T. 68-69*). The jeep had four wheel brakes, and he had driven the jeep at noon that day, shortly before the accident, and found the brakes in good working order. (*T. 140*).

### 4. *SPEED AND STOPPING ABILITY OF THE JEEP.*

Two members of the train crew saw the jeep, and estimated its speed at 10 miles an hour (*Clarkin, T. 190, 1. 23; T. 191, 1. 13-15; T. 192, 1. 3-6; Becker, T. 207; T. 219, 1. 25; T. 220, 1. 1; Plaintiff's Exhibit 7, 1. 32 on Pp. 1 through 1. 3 on Pp. 2*).

Allegations in the replies in both causes of action ad-



mitted in evidence alleged that the jeep was traveling at the rate of 12 to 15 miles per hour when it was within 50 feet of the crossing (*T. 318-319*).

Two highway patrolmen estimated the braking distance, and over-all stopping distance at the various speeds. Lehman testified that at 10 miles per hour braking distance would be  $4\frac{3}{4}$  feet to  $8\frac{1}{2}$  feet (*T. 149*), with a reaction time of 10 feet (*T. 150*). His estimate of the over-all stopping distance at 10 miles per hour would be  $14\frac{3}{4}$  feet to  $18\frac{1}{2}$  feet.

Sergeant Burnham estimated the braking distance at 10 miles per hour between  $4\frac{3}{4}$  feet and 6 feet, with an over-all stopping distance at that speed of  $14\frac{3}{4}$  feet to 16 feet (*T. 320-323*).

At 15 miles per hour, Lehman estimated the braking distance at  $10\frac{3}{4}$  feet to  $18\frac{1}{2}$  feet with a distance traveled during reaction time of 15 feet, or a total over-all stopping distance at 15 miles per hour of  $25\frac{3}{4}$  feet to  $33\frac{1}{2}$  feet (*T. 324*). Burnham estimated the braking distance at 15 miles per hour at between  $8\frac{3}{4}$  feet to 15 feet, or an over-all stopping distance of  $23\frac{3}{4}$  to 30 feet (*T. 320-323*).

Burnham testified that the stopping distance of a jeep at 12 miles per hour would be very close to half way between the stopping distance for 10 and 15 miles per hour respectively (*T. 323*).

##### 5. *SPEED AND STOPPING ABILITY OF THE TRAIN.*

Terlson estimated the speed of the train at the moment

of impact at 45 to 50 miles per hour (*T. 162*); Clarkin 45 to 50 miles per hour (*T. 191, 192*); and Becker at 45 miles per hour (*T. 220*). Campbell, witness for plaintiff, testified concerning a conversation with Clarkin at the scene of the accident shortly after it occurred, at which time he said Clarkin told him that the speed of the train was 45 miles per hour (*T. 247*). Proof by the appellant concerning the stopping ability of the train was based on its speed of 45 miles per hour (*Hoovestal, T. 83; Morton, T. 251*).

Hoovestal was questioned by the appellant as an expert on stopping distances, subject to the objection of the defense that no sufficient foundation was laid and the defense was granted a running objection (*T. 84, 86, 87 and 90*). On cross-examination he volunteered that he was not an expert on stopping distance (*T. 100*). Likewise, he testified that he could not say from the testimony he had heard whether or not the train had been dynamited (*T. 95*), that he could not attempt to answer, and did not really know, the distance the train would travel before brakes were applied (*T. 91, 1.3*), that he had only operated himself an engine on one occasion (*T. 99*), that he had never applied the emergency brakes on a train (*T. 86, 1. 10*), but that he had worked as a fireman between 1942 and 1945, although he had not worked since (*T. 99*). He further testified that he was never on a train of that length and size when an emergency stop was made (*T. 100, 1. 14-16*), that he had never applied an emergency brake on any train (*T. 86, 1. 10*). Assuming that his testi-

mony was admissible, despite his admission that he was not an expert, and despite the qualification he himself made concerning his ability to testify, he did say that the train would come to a normal stop in 900 feet (*T. 88, l. 10*), and could make an emergency stop in approximately 500 feet (*T. 89*).

Morton, a retired engineer, was also called by the appellant as an expert on stopping distance. We have considerable doubt whether or not he was sufficiently qualified to testify as an expert, but assuming that he was, he said that two car lengths would be 80 feet in length (*T. 252, l. 22*), and that the train would travel about two car lengths after the brakes were applied before any braking action would commence (*T. 251-252, l. 23-25 and l. 1*). He testified that at 45 miles per hour, the train would travel 80 feet from the time the brake lever was applied, before braking action commenced, and an additional 600 feet thereafter before the train would stop at 45 miles an hour, or an over-all total of 680 feet from the time the brake lever was applied (*T. 253*). On cross-examination he admitted that his opinion was based entirely on an air brake table in a brake book (*T. 253*), that he agreed with the statement of the table in that book that the table was based on the "impossible assumption of the same holding power or shoe friction at different speeds" (*T. 253-257*).

#### 6. *TIME OF DAY OF ACCIDENT.*

Plaintiff was out in a field approximately 300 yards to the east and north of the crossing. The train went by

him after the accident had occurred, stopped, backed up and stopped at the crossing. It was after the train had backed up and stopped at the crossing when plaintiff then for the first time looked back towards the crossing (*T. 143-144*). The atmosphere was clear, it was a clear day, with no clouds to speak of, extremely dry. When he arrived at the scene, he was inclined to say it was broad daylight. There was no obstruction as far as his vision was concerned as far as light was concerned (*T. 63, 1. 18-25*). He was asked at what time of day the accident occurred, and said it was getting along toward sunset in the vicinity of 5:00 (*T. 53, 1. 1-3*). With respect to whether or not the sun had already set the moment when he first looked toward the crossing, he answered, "I am not prepared to say whether the sun had set or whether it had not. My impression is that it just dropped below the horizon." He did not know where the sun actually was at the moment of impact of his own knowledge. He admitted that at the time the accident occurred, he got the impression from the conversation there at the scene that it had occurred at 5:10 P. M. (*T. 144-145*). Plaintiff's wife testified that she heard the crash, that it occurred after 5:00 P. M., but she could not exactly say what time of day it was, except that it was daylight (*T. 266*). The fireman testified that it was not dark, it was just getting dark, and was still pretty light (*T. 208*). The engineer testified that the sun had set before the accident occurred, and he had turned the engine headlight on dim about three miles west of the point of accident (*T. 173-175*).

Plaintiff's Exhibit 4 is a certificate of the Weather Bureau showing the time the sun set (*T. 146*). There is no evidence whatsoever as to where the setting sun would be located at that time of the year in that geographical location, no evidence to indicate that it would in any way interfere with the deceased or his view, if it was setting when he approached.

Defendant's Exhibit 5, and Plaintiff's Exhibit 7, affidavits of the conductor and fireman, indicate that it was daylight.

### 7. *SOUND OF THE PASSING TRAIN*

Plaintiff was in the field some 300 yards to the east and some distance north of the crossing. He heard the sound of the crash, and then testified that he both heard and saw the engine and cars as they passed by the point where he was located (*T. 53*). Mrs. Feeley testified that the deceased had just left her home. She heard the crash, and suspected that he might have been in the accident because just prior to that moment when she heard the crash, she had heard the rumbling of the train and knew that it was approaching, and she heard that from her location within the house (*T. 269-270*), and the house according to Plaintiff's Exhibit 1 was located approximately 290 or 300 feet north of the crossing.

### 8. *LOOKOUT BY THE TRAIN CREW.*

Conductor Clarkin was on the left or north side of the cupola of the caboose. In his affidavit, Defendant's Exhibit 5, introduced at *T. 186, 201*, he stated that when the engine was about 200 feet from the crossing, he saw the

jeep about 50 feet from the crossing, approaching at a slow speed, the train then going 45 to 50 miles per hour. Because of its slow speed, he thought the jeep was going to pull up close and stop.

On direct examination, Clarkin testified that the train was going 45 to 50 miles per hour, the jeep at 10 miles per hour, and that when the engine was about 200 feet from the crossing, he saw the jeep about 200 feet from the crossing. When asked whether or not that seemed reasonable to him that they would both be the same distance, he suggested the automobile must have been further off than that (*T. 190-194*). He then stated that he was confused between the vehicles, and that when he first saw the jeep it was around 50 feet from the crossing (*T. 198*). He had thought that the automobile traveling at the slow speed was going to drive up close to the crossing and stop (*T. 196*). On cross-examination, Clarkin testified that regardless of estimates with respect to distances and feet, he could place the jeep by physical objects where it was when he first saw it, and that when he first saw it it was to the right or south of the barbed wire fence, or right of way fence, marked No. 8 and located 75 feet north of the track (*T. 199-200*).

Clarkin's affidavit, Defendant's Exhibit 5, is consistent with his testimony with respect to observations and speed.

Becker testified in substance that when the engine was approximately one-quarter mile from the crossing, he saw the jeep as it came behind the cottonwood trees to turn down and go south on the dirt road. He judged its

speed at 10 miles per hour (*T. 207-210*). As the engine passed over the switch about a quarter of a mile from the crossing, he thought it was rough, and jerked, so he watched back along his train, and along the track, and completely forgot about the jeep again until the impact. (*T. 212-213, 219-220*). His testimony in that regard was consistent with his affidavit, Plaintiff's Exhibit 7, and the affidavit was copied from an original statement of facts which he made within a few days after the accident occurred, and which was present and compared with the affidavit at the time it was signed (*T. 281-287*).

#### *9. SIGNALS BY THE RAILROAD CREW.*

The whistle was blown as the engine passed around the curve and approached toward the crossing, but the crew could not say at exactly what point the whistle was stopped between the curve and the crossing (*T 162-166; T. 226*). No bell was rung (*T. 213, 226*). Neither the plaintiff nor his wife heard a whistle or bell (*T. 267*).

#### ARGUMENT

#### *FACTS SHOWING NEGLIGENCE OF DECEASED AND INAPPLICABILITY OF LAST CLEAR CHANCE.*

These facts are undisputed:

1. It was daylight, the weather was clear, the road was dry.

2. Deceased had lived beside, and was thoroughly familiar with, the crossing for over thirty years, and knew of its heavy use by rail traffic at all hours of the day and night.

3. For over 100 feet of approach, the deceased had an unobstructed view of the crossing and the tracks to the west for over a quarter of a mile.

4. The jeep was in excellent physical condition with good brakes.

5. Deceased approached in the jeep at a speed of 10 to 15 miles per hour at which speeds he could stop in a distance from the crossing of  $14\frac{3}{4}$  ft. to  $33\frac{1}{2}$  ft., or at a point from the crossing measured in time from 1 to 1.51 seconds.

6. When the jeep was at its stopping distance from the track of between  $14\frac{3}{4}$  ft. to  $33\frac{1}{2}$  ft., the train was from 66.37 ft. to 110.5 ft. from the crossing, approaching at a speed of 45 miles per hour; it would travel at least 80 feet of that distance of 66.37 ft. to 110.5 ft. after the brakes were applied before the braking action commenced; and it would stop in 500 feet to 680 feet.

7. Deceased drove without stopping to the point of impact.

It will perhaps assist the court to consider the following table comparing the relative distances from the crossing of the jeep and train in feet and seconds.

#### COMPARISON OF DISTANCES IN FEET AND SECONDS TRAVELED BY JEEP AND TRAIN

1. Jeep at 10 m.p.h.; Train at 45 m.p.h.

<i>Jeep From</i>	<i>Seconds From</i>	<i>Train From</i>
<i>Crossing</i>	<i>Crossing</i>	<i>Crossing</i>
10 ft.	.68 seconds	45 ft.
14.75 ft.) <i>Stopping</i> (	1.00 seconds	66.37 ft.
18.5 ft.) <i>Distance</i> (	1.26 seconds	83.25 ft.
25 ft.	1.7 seconds	112.50 ft.



50 ft.	3.4 seconds	225 ft.
75 ft.	5.1 seconds	337.50 ft.
100 ft.	6.8 seconds	450 ft.
111 ft.	8.5 seconds) <i>Stopping</i>	(500 ft.
151.1 ft.	10.3 seconds) <i>Distance</i>	(680 ft.
2. Jeep at 12 m.p.h.; Train at 45 m.p.h.		

<i>Jeep From Crossing</i>	<i>Seconds From Crossing</i>	<i>Train From Crossing</i>
10 ft.	.56 seconds	45 ft.
21.75 ft.) <i>Stopping</i>	( 1.23 seconds	81.56 ft.
25 ft.)	( 1.4 seconds	93.75 ft.
26 ft.) <i>Distance</i>	( 1.47 seconds	97.5 ft.
50 ft.	2.8 seconds	187.5 ft.
75 ft.	4.2 seconds	281.25 ft.
100 ft.	5.6 seconds	375 ft.
125 ft.	7.0 seconds	468.75 ft.
149.60 ft.	8.5 seconds) <i>Stopping</i>	(500 ft.
181.33 ft.	10.3 seconds) <i>Distance</i>	(680 ft.
3. Jeep at 15 m.p.h.; Train at 45 m.p.h.		

<i>Jeep From Crossing</i>	<i>Seconds From Crossing</i>	<i>Train From Crossing</i>
10 ft.	.45 seconds	30 ft.
23.75 ft.) <i>Stopping</i>	( 1.07 seconds	71.25 ft.
25 ft.)	( 1.13 seconds	75 ft.
33.5 ft.) <i>Distance</i>	( 1.51 seconds	110.5 ft.
50 ft.	2.26 seconds	150 ft.
75 ft.	3.39 seconds	225 ft.
100 ft.	4.52 seconds	300 ft.
125 ft.	5.65 seconds	375 ft.
150 ft.	6.78 seconds	450 ft.
166 ft.	8.5 seconds) <i>stopping</i>	(500 ft.
226.66 ft.	10.3 seconds) <i>Distance</i>	(680 ft.

a. *Under Montana Law Applicable, Negligence of Deceased Was The Proximate Cause as a Matter of Law.*

In cases far less favorable to the defendant from the standpoint of visibility, the following rules of law applicable have been established, repeated, and reaffirmed by our Supreme Court time after time. For over 100 feet of approach Feeley's view was unobstructed. Under similar fact situations our Montana court has held that the act of proceeding from the zone of safety directly in front of the approaching train is negligence constituting *the proximate cause of his injury*.

The following are rules established in Montana in the following cases, all of which affirmed nonsuits or directed verdicts:

1. The presence of a railroad track is of itself a warning of danger.
2. A person approaching a railroad crossing is required to take all reasonable precautions to assure himself by actual observation that there is no danger from an approaching train.
3. If his view of the track is obscured, he must take such precautions as will render sight and hearing effective before moving into a position from which he cannot extricate himself in the event of the near approach of the train; he is required to exercise a greater degree of care for his own safety.
4. The failure of the persons in charge of the train to give warning signals of its approach does not relieve the traveler of the necessity of making a vigilant use of his senses to ascertain whether it is safe to proceed.
5. Whenever it appears that there is a zone of safety

within which a traveler upon a highway may, by looking or listening and stopping to do so if need be, ascertain the presence of an oncoming train, it is his duty to make his observation within such zone. If he proceeds from the place of safety regardless of an approaching train of which he has knowledge, or if he leaves the place of safety without having made a vigilant use of his senses to discover a danger which is present and could have been seen from such place, *then it will be held to be his negligence which is the proximate cause of an injury resulting from a collision regardless of circumstances tending to show negligence on the part of the railroad operators.*

6. When a train is at a point which is within the traveler's vision while he is in a place of safety, he will be deemed either to have seen it and proceeded regardless of the danger, or to have failed to make a vigilant use of his senses. *In such a situation the traveler is the author of the misfortune which befalls him, if he meets with injury.*

*See: G. N. Ry. Co. v. Taulbee,*  
92 F. (2d) 20, cert. den. 82 L. Ed.  
595, 58 S. Ct. 476.

*Roberts v. C. M. & St. Paul Ry. Co.,*  
67 Mont. 479, 216 Pac. 332.

*Rau v. N. P. Ry Co.,*  
87 Mont. 521, 289 Pac. 580.

*Grant v. Chic. etc. Ry. Co.,*  
78 Mont. 97, 252 Pac. 382.

*Lee v. Davis,*  
76 Mont. 466, 247 Pac. 1094.

*West v. Davis,*  
71 Mont. 31, 227 Pac. 41.

*Normandin v. Payne,*  
65 Mont. 543, 212 Pac. 285.

*Keith v. G. N. Ry. Co.,*  
60 Mont. 505, 199 Pac. 718.

*George v. N. P. Ry. Co.,*  
59 Mont. 162, 196 Pac. 869.

*Sherris v. N. P. Ry. Co.,*  
55 Mont. 189, 175 Pac. 269.

*Sullivan v. N. P. Ry. Co.,*  
109 Mont. 93, 64 P. (2d) 651.

The facts in many of the foregoing cases were less favorable to the defendant Railway Company from a standpoint of visibility than are the facts in this case. For example, in the case decided by this Ninth Circuit Court, *Great Northern Railway Company v. Taulbee*, 92 F. (2d) 20, Cert. den. 58 S. Ct. 476, at 30 feet from the track, the view was unobstructed for a distance of only 160.9 feet; from 25 feet a distance of only 184.5 feet; from 20 feet a distance of 236.2 feet; and from 15 feet a distance of 444.1 feet. In our case, throughout the last 100 feet of approach, there was an unobstructed view for a quarter of a mile. Likewise, it is interesting to note in the *Great Northern Railway Company v. Taulbee* case that there was a factual dispute with reference to whistle and bell signals. The court in that case said:

“There Taulbee discharged his passengers. He then turned his automobile round and drove west, back to the highway, re-entering it at a point about 20 feet north of the main line crossing. From that point he drove south on the highway, without stop-

ping, until he reached the crossing. There his automobile was struck by the locomotive of an eastbound train on appellant's main line track, and he was instantly killed.

"This happened in clear daylight at about 7:05 o'clock a.m. From the time it re-entered the highway until it was struck by the locomotive, Taulbee's automobile was traveling at a speed of between 6 and 7 miles an hour, which is to say, between 8.8 and 10.27 feet a second. The locomotive was traveling at a speed of between 55 and 60 miles an hour, which is to say, between 80.67 and 88 feet a second.

"Demonstrably, therefore, when Taulbee's automobile was 20 feet from the crossing, the locomotive was within 200 feet thereof and was in plain view of Taulbee. If he did not see it, it was because he did not look. His view of it was wholly unobstructed. If he had looked, he could have stopped his automobile in time to avoid the collision. Failing to do so he was guilty of negligence. (Citing cases.)

"Whether or not appellant also was negligent, or whether its negligence, if any, concurred with Taulbee's in causing the collision, it is unnecessary to decide. Taulbee's negligence, if not the sole cause, was at least a proximate cause of the collision. Whether it was the sole cause, or was a concurrent cause amounting to contributory negligence only, is immaterial. In either case, recovery is barred.

"Appellant's motion for a directed verdict should have been granted."

In *Grant v. Chicago, Milwaukee & St. Paul*, 78 Mont. 97, 252 Pac. 382, the train approached in a cut of varying depth. At 50 feet from the track, the upper part of the engine only could be seen at a distance of 198 feet from the crossing; at 40 feet the engine from the center of the boiler up could be seen at a distance of 235 feet from

the crossing; at 30 feet the engine from the boiler up at a distance of 293 feet; at 20 to 25 feet, the entire engine at a distance of over 335 feet. In that case, our Montana Supreme Court said:

“ \* \* \* and if a view of the track is obscured or factors make the sound of an approaching train inaudible, he must take such precautions as will render sight or hearing effective before moving into a position from which he cannot extricate himself in the event of the near approach of the train.”

In *Rau v. N. P.*, 87 Mont. at 537, 289 Pac. 580, the Supreme Court said:

“ ‘Every person is bound to an absolute duty to exercise his intelligence to discover and avoid dangers that may threaten him. When, therefore, a plaintiff asserts the right of recovery on the ground of culpable negligence of the defendant, he is bound to show that he exercised his intelligence to discover and avoid the danger which he alleges was brought about by the negligence of the defendant.’ (Citing cases.)

“ ‘A person approaching a railroad crossing is required to take all reasonable precautions to assure himself by actual observation that there is no danger from an approaching train. The failure of the persons in charge of the train to keep a lookout and to give warning signals of its approach to the crossing does not relieve the traveler from the necessity of making a vigilant use of his senses to ascertain whether it is safe to proceed. (Citing cases.) It is not always sufficient if he does look and listen. The obligation resting upon him is to exercise care to make the act of looking and listening reasonably effective. (Citing cases.) If he goes upon the crossing without taking this precaution, he is guilty of contributory negligence. (Citing cases.)’

“ ‘The rule as to the caution with which one must

approach a railroad crossing in this state without being guilty of negligence has been thoroughly established, and requires a person to use his senses vigilantly to determine whether or not a train is approaching, before he goes upon the track. This requires that he use his eyes and ears, and, if necessary to make his looking and listening reasonably effective, he must stop at such point as will accomplish that purpose.' "

After discussing the foregoing rules and cases, the court reversed a judgment for plaintiff and directed a judgment for defendant in *West v. Davis*, 71 Mont. 31 at 43, 227 Pac. 41, with this language:

"Applying these principles to the case at bar, the conclusion cannot be avoided that the plaintiff in this action was himself guilty of such contributory negligence *as constituted the proximate cause of the collision between his automobile and the train*. It is apparent \* \* \* the train, at the time when plaintiff was in a place of perfect safety, was at a point where plaintiff could not have failed to observe and hear it if he had looked or listened \* \* \* ; and we think, for the reasons above stated, and in view of the previous decisions of this court, that the trial court erred in refusing to grant the nonsuit requested by the defendant at the close of plaintiff's case, and also erred in refusing to direct a verdict for defendant, \* \* \* ."

In affirming a judgment of nonsuit, the court said in *Roberts v. Chic. etc. Ry.*, 67 Mont. at 480, 216 Pac. 332:

"At that point she was in a place of safety, and it was her duty to remain there until the danger passed. Having proceeded beyond to a position which was at least debatably dangerous, with the approaching train in view, *it must be held that her negligence was the proximate cause of her own death, and that notwithstanding the speed of the train, and notwithstanding the failure to give proper*

*warning signals, at the proper place, the railroad company was not liable for the result of the collision."*

The other Montana cases cited above in addition to those from which we quoted, set out the same basic rules.

In addition to the case decisions cited and quoted above, deceased was negligent as a matter of law when he violated the following section of our Code:

" \* \* \* provided, however, all persons driving motor vehicles \* \* \* where the view is obscure, or when a moving train is within sight or hearing, shall bring said vehicle to a full stop not less than ten nor more than one hundred feet from where said highway intersects railroad tracks \* \* \* " (*Section 72-164, R.C.M. 1947*).

Accordingly, under the foregoing unbroken line of Montana decisions, deceased, who knew of and was familiar with the heavily used crossing, was required to take such precautions as were necessary to assure himself that there was no danger from an approaching train before moving into a position from which he could not extricate himself. When he approached the crossing without stopping, and drove from a place of safety without having made a vigilant use of his senses to discover his danger, it must be held that it was his own negligence which was the proximate cause of his accident. This would be even more true if his view was obscured by the sun, of which there is no evidence.

b. *Last Clear Chance Inapplicable.*

Plaintiff appellant cannot avoid the effect of the unbroken line of Montana decisions above holding that the



acts of the deceased Feeley were the proximate cause of his accident. Labeling his actions as last clear chance cannot convert negligence which is a proximate cause, to negligence which is a remote cause. There is simply no room for the application of the doctrine under a set of facts where both parties approach simultaneously to the point of impact, where the automobile driver has the obligation to vigilantly look for the train, stopping to do so if necessary, and where the automobile actually has the greater stopping ability, and thus the last clear chance to avoid the accident.

To find for the plaintiff appellant in this case, the court would have to hold that every train approaching a grade crossing has to be kept under the same control as an automobile. The court would have to revoke the well established basic rule that an engineer approaching a crossing such as the one in this case has the right to assume and act upon the assumption that any person approaching such crossing is in possession of his faculties of sight and hearing, and that he will use these faculties and will look and listen and see and hear the train if it can be seen or heard, and will stop before reaching the track. If a train had to slow down or stop at its stopping distance from every crossing to which a motor vehicle was simultaneously approaching, time schedules and the orderly flow of transcontinental rail traffic would be eliminated. We do not think the law requires such control as the plaintiff appellant advocates.

In the *Armstrong* case, 110 Mont. 133, 99 p. (2d) 323,

our Montana court indicated we will in the future follow the enlightened view of the Restatement of Torts. *Section 479* involved in that case was based on a fact situation where the plaintiff was in helpless peril and unable to avoid the accident by the exercise of reasonable care. Our case is one where the deceased at all times right up to the moment of impact could have avoided the harm and falls squarely with the next section of the Restatement, *Section 480*. That reads:

“Sec. 480. Last Clear Chance; Negligently Inattentive Plaintiff.

“A plaintiff who, by the exercise of reasonable vigilance could have observed the danger created by the defendant’s negligence in time to have avoided harm therefrom, may recover, if, but only if, the defendant

- (a) knew of the plaintiff’s situation, and
- (b) realized or had reason to realize that the plaintiff was inattentive and therefore unlikely to discover his peril in time to avoid the harm, and
- (c) thereafter is negligent in failing to utilize with reasonable care and competence his then existing ability to avoid harming the plaintiff.

In *Collins v. Crimp*, 91 Mont. 326, 8 p. (2d) 796, a boy on a scooter struck a car and landed on the fender. The car at 15 miles per hour could have stopped in 4 or 5 feet but continued 45 feet during which time the boy fell off and was run over. The court reversed a plaintiff’s verdict and held there was no liability under last clear chance as a matter of law for any failure to slacken speed or stop because of the fact the defendant had only 3 sec-

onds in which to act between the instant of impact and the moment when the boy fell from the fender.

"The evidence does not warrant a finding that, driving the almost infinitesimal period of time between the moment the boy landed on the fender and the instant he slid to the pavement, the defendant was negligent in failing sooner to apply his brakes, which negligence was the proximate cause of the boy's death."

There are no other Montana cases to afford plaintiff any solace. To permit this case to go to a jury would constitute a complete, radical departure in Montana law.

The latest application of the doctrine in Montana in a crossing case is in *Pollard v. Oregon Short Line R. R. Co.*, 92 Mont. 119, 11 p. (2d) 271. The railroad engineer in that case testified to facts similar to those in this case—that is, that the motorist was at all times approaching the crossing as the train was approaching in his plain, unobstructed view. In direct contradiction of the testimony of the engineer, the plaintiff motorist in the *Pollard* case testified that his car stalled on the crossing before the train ever came into view one-half mile away. As far as his evidence was concerned he was never in a zone of safety; he was at all times in a position of danger on the tracks. The opinion reads in part:

"It is to be noted that the engineer did not say that he saw the truck but did not know that it was occupied \* \* \*. His explanation is that he saw the plaintiff driving his truck and approaching the crossing simultaneously with the approach of the train, and saw that plaintiff was not going to stop too late to stop the train. His story is supported by the testimony of the fireman \* \* \*. However, this testi-

mony but created a conflict in the evidence; the jurors were at liberty to believe the engineer when he said he was keeping a vigilant lookout and did see the plaintiff in his truck, and to disregard his testimony as to where the truck was, in favor of the plaintiff's statement that the truck was stalled upon the track before the train rounded the curve half a mile away; \* \* \*

Because of the motorist's testimony that he was stalled on the crossing, the court affirmed the submission to the jury. The opinion reads further:

"It is true that this court has recognized the rule that where an accident is the result of negligence of the plaintiff concurring with the primary negligence of the defendant up to and producing the injury, there is no room for the application of the last clear chance doctrine (citing cases), but the doctrine presupposes negligence on the part of the plaintiff and attaches in spite of such negligence when there is a break in the sequence of events. Here as in the Neary case, the plaintiff remained passive and oblivious of his danger, because of his preoccupation in the work at hand, and thereafter \* \* \* the engineer discovered his perilous situation in time to have avoided the accident, but did not employ the means at his command to avoid it, and 'the defendant's last act of negligence becomes the sole proximate cause of the injury, while his initial negligence and the primary negligence of the defendant become but the remote cause thereof.' (citing cases) \* \* \*

"The evidence is sufficient, if believed by the jury, to warrant the implied finding that the plaintiff was so absorbed in his efforts to get the truck off the track for the protection both of the truck and the rolling stock and passengers of the defendant as to bring the case within the rule announced in the Neary Case, and thus render the doctrine of the last clear chance applicable."

Railroad crossing case decisions prior to the *Pollard* case involved a similar situation where the plaintiff was at all times in a zone of danger in front of the oncoming train and was never in a zone of safety; where the defendant saw him in the zone of danger and had plenty of time thereafter in which to stop. In *Neary v. N. P. Ry. Co.*, 37 Mont. 461, 97 Pac. 944, an employee was standing on the track engrossed in his work. In *Riley v. N. P. Ry. Co.*, 36 Mont. 545, 93 Pac. 948; in *Melzner v. N. P.*, 46 Mont. 163, 127 Pac. 146, and the companion case of *Haddox v. N. P.*, 46 Mont. 185, 127 Pac. 152; in *Dahmer v. N. P. Ry. Co.*, 48 Mont. 152, 136 Pac. 1059; in *Doichinoff v. Chic. etc. Ry. Co.*, 51 Mont. 582, 154 Pac. 924; and in *Stricklin v. Chicago etc. Ry. Co.*, 59 Mont. 367, 197 Pac. 839, the plaintiffs were on the tracks at all times in a zone of danger.

In deciding the *Pollard* case the Montana Supreme Court cited and relied upon decisions from other jurisdictions, including Washington, Utah, California, Iowa, North Carolina and Virginia. It is interesting to note that all those decisions cited and relied upon were similar as far as facts were concerned—that is, plaintiffs not approaching danger but rather at all times in a zone of danger. If we examine later decisions from those same jurisdictions involving a fact situation similar to this case, where both vehicles were approaching at the same time, we find the court's ruling with the defendant was a matter of law.

Washington was one of the jurisdictions cited and re-

lied upon by the Montana court in the *Pollard* case. In a later case, *Northern Pacific Ry. Co. v. Robison*, *Ninth Circuit Court, Washington*, 143 F. (2d) 352, this court reversed a judgment for plaintiff and held, just as it did in *Great Northern Railway Company v. Taulbee*, above, that a directed verdict should have been granted. The decision indicates there was a failure to ring the bell or blow the whistle in violation of statute, and that deceased was not familiar with the crossing as was the deceased Feeley. This court held:

“The evidence establishes without conflict the following facts: The collision occurred in midafternoon (4:15 P.M.) of a clear, bright, sunshiny midsummer day. The crossing where the collision occurred was a right-angle crossing, the railroad running east and west, the highway north and south. The train was traveling east at a speed of about 35 miles an hour. The automobile was traveling north at a speed of about 45 miles an hour. On the east side of the highway, 15½ feet south of the crossing, there was a standard railroad crossing sign consisting of a pair of crossarms six feet long mounted on a post ten feet high, with the word ‘Railroad’ painted on one arm and the word ‘Crossing’ painted on the other. Decedent, driving north on the highway, had an unobstructed view of the crossing sign, the railroad track and the train itself. He could see the train from the time he came within 800 feet of the crossing. He could see the sign from the time he came within 500 feet of the crossing. He could see the track from the time he came within 200 feet of the crossing. He nevertheless drove onto the crossing in front of the train and was killed. We conclude that he was guilty of contributory negligence as a matter of law.”

For later decisions of the Washington State Supreme Court see:

*Hopp v. Northern Pac., Wash., 147 P. (2d) 951; Morris v. C. M. St. P. & P., Wash., 87 P. (2d) 119, 100 P. (2d) 19.*

One of the later cases from Utah, a jurisdiction cited by our court in the *Pollard* case, is *Holmgren v. Union Pac. Ry. Co., 198 P. (2d) 459*, decided October 13, 1948, affirming a judgment of nonsuit and involving a day-time afternoon accident. U. S. Highway No. 91 ran parallel with the railroad tracks. An oil road led from Highway No. 91 over said tracks at a slight angle. Plaintiff, familiar with the crossing, followed two ambulances from Highway No. 91 toward the crossing. He was going 10 to 12 mph. At the same time a train approached at a speed of about 40 mph. A motorist had a fairly good view along the tracks for most of the road distance to the tracks, although there were partial obstructions. It was undisputed that for a distance of 30 to 35 feet from the tracks he had an unobstructed view along the tracks for 4,000 feet. He was struck by the engine when he drove in front of the approaching train. The court first discussed and held plaintiff guilty of contributory negligence as a matter of law. It then discussed the doctrine of last clear chance and held no liability as a matter of law under this doctrine, where the plaintiff, while approaching the position of danger, had the duty to look and the same opportunity to avoid the accident by the exercise of ordinary care as did the defendant railroad.

With reference to the rights of the train crew observing the motorist approach, the court said:

“The rules stated in the above quoted authorities are followed in this jurisdiction. In the recent case of *Van Wagoner v. Union Pac. R. Co.*, Utah 186 P. 2d 293, 302, we said, speaking through Mr. Justice Latimer:

“The engineer or other members of the train crew could assume the deceased would stop until he was so close to the track that a reasonable person would know otherwise. Undoubtedly when deceased cleared the one tree some 20 feet from the crossing, it would be apparent that he did not intend to stop. Disregarding the testimony of two members of the crew that when they did see the truck clear this tree they gave the emergency signal, appellants’ evidence only permits one or two seconds for the train crew to have taken the necessary steps to have prevented the accident. This is not giving the defendant the last clear chance. *The opportunity to avoid the accident must not be a possibility; it must be a clear opportunity.* Not even by speculation could the jury reach a verdict on the theory that the train crew had time to appreciate that deceased was negligent and that by reasonable means they could have avoided the ensuing collision. *When, as in this jurisdiction, a train has the preferred right of way, its operator is entitled to assume the driver of a car will yield to this preferment, and if the doctrine of last clear chance is to be invoked, it must clearly appear that time permitted the train crew to appreciate deceased’s predicament, and to give warnings sufficiently early enough for the deceased to extricate himself, or the time element was sufficient to permit the crew to bring the train to a stop.* No such showing was made here.’ (Italics added.)”

California was cited and relied upon by our court in the Pollard case. The facts in *Lindley v. Southern Pacific, Cal.*, 64 P. (2d) 490, were very similar to those in



this case. There was a daytime accident at a country crossing. The tracks ran east and west. About 150 feet to the north, a paved public highway paralleled the tracks. A dirt road, 20 feet wide, ran southerly from the highway sloping down as it left the highway and sloping up as it crossed the tracks at 54 degrees. The lowest point of the road was 5' below tracks at 50 feet from the tracks. At 25 feet from the tracks, the road was 3 feet below. The surrounding country had some desert growth. Plaintiff had lived south of the crossing for eight years and was familiar with it. The train was traveling 35-40 miles per hour. The car was going 4-5 miles per hour. The fireman saw the car 50-60 feet from the track. When the car was 10-12 feet from the track, the fireman realized it would not stop. The engine struck the car. Four truck drivers testified the engine bell and whistle were not sounded. The court held the plaintiff negligent as a matter of law and last clear chance inapplicable as a matter of law. With reference to last clear chance, the opinion holds:

“The only other point raised is that even if the deceased was guilty of contributory negligence the doctrine of last clear chance applies and the matter should have been submitted to the jury. It is argued that when the deceased was 10 or 12 feet from the track the fireman realized that he was not going to stop, that the deceased could have stopped instantly at any time while he was traversing that 10 or 12 feet had he been warned of the approach of the train by the sounding of a whistle, and that the respondents had the last clear chance to avoid the accident by sounding the whistle during that time. It is equally

true that the deceased could have avoided the accident by looking at any time during the same period. The fireman had a right to assume that the deceased would stop, especially since he slowed down shortly before reaching the track. When the fireman realized that the deceased was not going to stop the train was so close to the crossing that it was a matter of split seconds. It was the natural thing for him to think first of the application of the brakes and to act to that end. If, after calm reflection, it may be said that it would have taken an appreciable part of the time available, it cannot be said that any chance which the fireman had to avoid the accident was a clear chance. Without taking the time to review the authorities we are satisfied that the doctrine of last clear chance had no application under the facts of this case, as presented by the record before us. (Citing cases.)

"After reading the entire record, we are of the opinion that the negligence of the deceased was of a nature which will not permit of a recovery in this case under any theory permitted by the established law of this state."

For similar holdings under similar fact situations see the following decisions from those other jurisdictions cited and relied upon in the *Pollar* cases.

Iowa:

*Mast v. Illinois Cent. Ry. Co.* 8th cl, 176 F. (2d) 157;

*Hitchcock v. Iowa Southern Utilities*, 6 N.W. (2d) 29;

N.C.:

*Riddle v. So. Ry. Co.*, 4th C. C., 114 F. (2d) 259;

*Redmon v. So. Ry. Co.*, 143 S.E. 829;

*Stevens v. So. Ry. Co.*, 75 S.E. (2d) 232;

Va.:

*Elec. & Power Co. v. Vellines*, 175 S.E. 35.

One of the latest decisions in Montana on last clear chance is that of *Sorrels v. Ryan*, *Mont. reh. den. March 31, 1955, 281 P. (2d) 1028, Mont.* It involves the sufficiency of the complaint in a pedestrian-auto case and does not apply to or affect, the rules of law applicable at a railroad crossing. Between the opinion in chief and the per curiam statement on rehearing it appears that under the pleading the pedestrian had crossed one-half the street, then proceeded over the far half into the lane of travel and danger directly in front of the approaching vehicle when the driver had time to turn out, pass around, and avoid the accident. With reference to the *Pollard* case, the court simply said in its opinion in chief at page 1030:

“Plaintiff relies largely on the case of *Pollard v. Oregon Short Line Ry.*, 92 Mont. 119, 11 P. 2d 271.

“That case established the rule in this state that the doctrine of last clear chance has application to a case not only where defendant actually saw plaintiff in a position of peril in time to avoid the injury by the exercise of reasonable care but also to a case where in the exercise of reasonable care he should or could have discovered plaintiff in his perilous position in time to avoid the injury. True that was a case where the injury arose at a railroad crossing where there was a clear legal duty on the part of those operating trains to keep a lookout.”

The latest decision in Montana considering last clear chance is *Burns, Administrator v. Fisher*, Cause No. 9469, decided June 9, 1955, ..... *Mont.* ....., ..... *P. (2d)* ..... In that case, deceased was operator of a Ford truck stalled on a highway at night. The rear lights of the

stalled truck were on, but no flares were put out. The rear of the cab was obstructed by a tool shack being transported. Deceased sat in cab. He could not be seen in the truck by an overtaking driver. A motorist passed the stalled truck shortly before the collision. Defendant's truck was overtaking the stalled truck at the same time two oncoming cars approached. The opinion stated that defendant's driver did not in fact see the stalled truck until the impact. Judgment of nonsuit was granted. The Supreme Court affirmed stating that there was no evidence of want of care on the part of the defendant driver; that death of the decedent was due to and proximately caused by his own negligence; and in answer to the contention that under the *Pollard* and *Armstrong* cases defendant should be liable under last clear chance, the court said that even assuming defendant driver should have seen the truck, he could not see or know that anyone was in the truck. The court held:

"This case does not present or justify application of the doctrine of last clear chance."

In addition to the foregoing cases, we call attention of the court to a few cases representative of the view of courts in other jurisdictions.

For example, the facts in *Mundt v. C. R. I. & P. Ry Co., Neb.*, 286 N.W. 691, show partial obstructions on the approach by reason of cuts, growing corn, and weeds. Plaintiff lived near, and was familiar with, the crossing. After holding the plaintiff negligent as a matter of law, the court said on last clear chance:

In addition to the foregoing cases, we call the attention of the court to a few cases representative of the view of courts in other jurisdictions.

"It must be considered also that the last act necessary to avoid the accident was that of stopping the automobile, an act which the plaintiff alone could perform. The defendants acting alone could not have avoided the accident. The plaintiff's position in and of itself, prior to and when discovered by defendants' brakeman and fireman, was not one of peril. The defendants cannot be charged with negligence for having failed to see him before that time. Had they seen him prior to that time, they had no reason to expect that he would not stop. It is the common practice of drivers to approach within a few feet of a crossing before stopping for a train to pass. It is not a common practice for drivers to stop at distance of more than 70 feet from a crossing. Had the defendants seen the plaintiff prior to the time they did, they had the right to expect him to do the ordinary act of stopping his automobile. Plaintiff's speed was not excessive at any time and was not such as would have caused alarm to defendants had he been discovered prior to the time he was seen. The peril was one that was caused by the negligent act of the plaintiff in continuing to approach the crossing without looking to the west, when to have done so would have disclosed his danger to him in time for him to have stopped his car.

"From the time that plaintiff's peril was discovered there was not sufficient time to avoid the accident and the defendant company and its agents did not have the ability at that time to avoid the impending collision. It necessarily follows that the doctrine of the last clear chance does not apply in this case."

To the same effect are:

*A. C. L. R. Co. v. Glenn, S. Car., U. S. Ct. of App., Fourth Circuit, July 28, 1952, 198 F. (2d) 232;*

*Clark v. B. & O. R. Co., Ohio, U. S. Ct. of App., Sixth Circuit, April 10, 1952, 196 F. (2d) 206;*

*C. St. P. M. & O. Ry. Co. v. Heyda, Minn., U.S. Ct. of App., Eighth Circuit, Nov. 2, 1951, 191 F. (2d) 944;*

*A. T. & S. F. v. Herbold, 10th C.G., 169 F. (2d) 12;*

*Hopkins v. Kum, Mo., applying Oklahoma law, 171 S.W. (2d) 625;*

*Bishop v. Atl. Coast Line R. Co., S. C., 48 S.E. (2d) 620;*

*Gates v. B.J.M. R., N.H., 37 A. (2d) 474;*  
*Peterson v. B. & M. R., Mass., on N.H. accident, 36 N.E. (2d) 701;*

*Jursic v. P. & L. E. R. Co., Pa., January 12, 1954, 102 A. (2d) 150;*

*Ekgren v. M. St. P. & S. S. M. R. Co., N.D., November 19, 1953, reh. den. December 4, 1953, 61 N.W. (2d) 193;*

*South. Ry. Co. v. Feldaus, Ky., June 12, 1953, reh. den. October 30, 1953, 261 S.W. (2d) 308;*

*Hicks v. N. P. Ry. Co. et al, Minn., May 29, 1953, reh. den. June 16, 1953, 58 N.W., (2d) 750;*

*George Siegler Co. v. Norton, N.J., Jan. 21, 1952, 86 A. (2d) 8.*

It is undisputed in this case that both parties approached simultaneously to the point of impact. It is undisputed that the automobile had a total stopping distance including reaction time of 14-3/4 ft. to 33-1/2 ft., or in time between 1 second and 1.51 seconds from the crossing. The railroad train, however, had a stopping distance of 500 to 680 ft. When the jeep was at its stop-

ping distance of 14-3/4 to 33-1/2 feet, or 1 to 1.51 seconds from the crossing, the train was 66.37 feet to 110.5 feet from the crossing. Of that distance 80 feet is required after train brakes were applied before braking action even started. Under such circumstances where is there any evidence to indicate that at the moment the plaintiff was in any danger zone, that this defendant had at any time thereafter an opportunity to see, react, and take the steps that would avoid this accident; that this defendant at that moment when the automobile driver was in any danger zone had time for thought, appreciation, and mental direction. In other words, where is there any evidence that this defendant had the last clear chance. It seems clear, that under circumstances such as these, it was the automobile driver himself who had the only last clear chance to avoid such an accident.

*c. IN ANY EVENT CONTINUING CONTRIBUTORY NEGLIGENCE BARS RECOVERY.*

Montana has consistently followed the rule that even in a proper case for the application of last clear chance, a plaintiff is barred if his negligence continues concurrently with that of the defendant to the moment of impact.

In the *Pollard* case, our court recognized that concurring negligence is a bar in Montana. The court said:

"It is true that this court has recognized the rule that, where an accident is the result of negligence of the plaintiff concurring with the primary negligence of the defendant up to and producing the injury, there is no room for the application of the last clear chance doctrine \* \* \*" (92 *Mont. at 132.*)

In the *Melzner* case, the court said:

“For the purposes of this case we may agree with counsel for appellants that, if the negligence of plaintiff concurs with that of the defendant up to and producing the injury, no recovery can be had, for under such circumstances there could not be room for the application of the doctrine of the last clear chance;” (*Melzner v. N.P.*, 46 Mont. at 181, 127 Pac. 146.)

Appellant in his brief states that his really serious objections pertain to the special requests on the negligence of deceased (*Br.*, Pp. 21); that the instruction on continuing, concurring contributory negligence cannot be reconciled with last clear chance; and, after quoting from the *Mihelich* case, that “it would appear, therefore, that the Montana courts agree that the theory of contributory negligence has no application in a last clear chance case where no other issue has been raised.” (*Br.*, Pp. 22). At page 19 of his brief, appellant supports his recitation of the situations which permit recovery under the doctrine of last clear chance with a reference to 1944 *Montana Law Review*, page 12. That law review article consisted of a very thorough and well considered discussion by Professor J. Howard Toelle entitled “Montana Applications of the Last Clear Chance Doctrine.” It was divided into three segments—first, Historical Background, in which was discussed the “helpless peril” situation covered by Section 479 of the *Restatement of Torts* and the “mentally inattentive plaintiff” situation covered by Section 480 of the *Restatement*; second, Montana decisions; and third; a discussion of the Future of the Doctrine. After reviewing all Montana decisions the



article came to the *Pollard* and *Armstrong* cases, at which the following significant discussion appears:

"In *Pollard v. Oregon Short Line R. R. Co.*, plaintiff's complaint contained both a count in primary negligence and a last clear chance count. At the close of plaintiff's evidence, plaintiff withdrew the first count, and the case proceeded under the theory of the last clear chance. (Discussing the case.)

\* \* \*

"It is believed that the case was properly disposed of on the record. Plaintiff was suing for personal injury; he was so absorbed in the checking of the coils that he failed to note the coming of the train; in other words, the case was one of mental inattention rather than of helpless peril. Accordingly, defendant's duty arose only based on actual discovery. \* \* \*

"In *Armstrong v. Butte Ry. Co.*, \* \* \* (Discussing the case). The case is notable in that it is the first Montana case citing the last clear chance provisions of the Torts Restatement. It is also notable in that together with the *Pollard* case, it marks a definite overruling of the language used in a long line of Montana cases in which the actual discovery or conscious last clear chance rule had been enunciated as the Montana doctrine. Now we are told that the unconscious last clear chance doctrine is also applied in proper cases. The two decisions will be hailed with satisfaction by the profession as aligning the court with the weight of authority and the 'enlightened' view. However, it is to be hoped that the court will not now move to the extreme of the humanitarian doctrine. There may be some excuse for some trepidation at this point owing to a statement in the *Armstrong* case at page 136 of 110 Montana referring to the last clear chance doctrine as 'what is usually referred to as the humanitarian doctrine.' Also by the statement in the *Pollard* case at page 133 of 92 Montana:

" 'Many cases, on the fact conditions shown, indi-

cate or declare that the continuing contributory negligence of the injured party takes the case out of the rule of the last clear chance, unless it is shown that for some reason he is in a position wherein it is physically impossible for him to extricate himself; but this is not in accord with the declarations of this court in the Neary and Doichinoff Cases . . .'

"Now it is submitted that the continuing contributory negligence of the injured party does take the case out of the last clear chance rule. At any rate, this is the weight of authority and Restatement view. If the plaintiff is mentally inattentive—'continuing contributory negligence'—and defendant fails to discover plaintiff's condition of inattention, they are both in fault—both equally mentally inattentive—and neither should have a cause of action against the other. But, if plaintiff is reduced to a condition of helpless peril ('physically impossible for him to extricate himself'—non-continuing contributory negligence), and the place is one where defendant was under a duty to keep a lookout which duty was breached, then defendant's liability attaches.

"These principles are not contra to the decisions in the Neary and Doichinoff cases where, as previously indicated, the court was actually dealing with negligently inattentive plaintiffs and properly on the record affirmed the judgments on the ground of actual discovery by defendant of the other's mental inattention in time to avoid the accident."

As indicated, appellant quotes from the *Mihelich* case as authority for his view that no instructions can be given on contributory negligence in a last clear chance case. (*Br. Pp. 22, 23.*) The complaint in the *Mihelich* case had contained three causes of action—one for ordinary negligence, one for wilful and wanton injury, and one for last clear chance. The answer contained a separate affirmative defense which concluded "that by reason of

plaintiffs' contributory negligence he cannot be heard to complain of or against plaintiffs." No reply was filed; default was entered; and the trial court granted a motion for judgment on the pleading. With that background the full quotation from which appellant quotes only a part states:

"Are the pleadings in such condition as to warrant the judgment entered? In so far as the first count—plaintiff's ordinary action for damages for an injury alleged to have resulted from defendants' negligence in a complete defense; the allegations of the separate affirmative defense became, in effect, an agreed statement of facts and the trial court had no authority to look to the complaint for any purpose,—it was commanded by the statute to enter such judgment as the defendants were entitled to 'upon the statement.' (Citing cases.) The judgment must stand as to the first count, unless the plaintiff was entitled to have the default set aside on his showing made prior to motion for judgment.

"However, a different situation exists as to the second and third counts, if they, respectively, state a cause of action on the last clear chance doctrine, and charge a wilful and wanton injury, for no amount of negligence on the part of a pedestrian will justify a driver in deliberately running him down, and no manner of negligence on the part of an injured person is a defense where the injury resulted from the wilful or wanton act of the defendant (*Neary v. Northern Pac. Ry. Co.*, 37 Mont. 461, 19 L.R.A. (n. s.) 446, 97 Pac. 944; 46 C. J. 981, and long list of cases cited), and 'in this state it is not fatal to the complaint that contributory negligence on the part of the plaintiff appears and a plea of contributory negligence is not a defense, if the action is brought upon the theory that, notwithstanding such negligence, the defendant has the last opportunity to avoid the injury and failed to exercise it.

*The rule of pleading* in cases which do not invoke the doctrine of the last clear chance does not have any application in \* \* \* (a) case which depends entirely upon that doctrine.' (Melzner v. Northern Pac. Ry. Co., 46 Mont. 162, 127 Pac. 146, 150.) The last clear chance doctrine presupposes negligence on the part of both the plaintiff and defendant, and plaintiff's contributory negligence is admitted by the allegations of his second and third counts. *The allegations of the separate defense, therefore, but joins issue as to the manner in which the accident happened and could have been proven under the general denial; no reply, as to the causes of action alleged in the second and third counts, was necessary.*" (Mihelich case, 85 Mont. at 616-617.) (Italics supplied.)

The foregoing does not justify the conclusion drawn by appellant. The remainder of the decision does not justify the conclusion. With respect to contributory negligence as a defense to last clear chance, the *Mihelich* case thereafter holds:

"Thus negligence which cannot be traced as the proximate cause of the injury does not create liability, and even though the defendant is shown to have been guilty of actionable negligence and it is shown that such negligence was not the *sole* proximate cause of the injury for the reason that the negligence of the plaintiff contributed as a proximate cause, no recovery may be had; but even here plaintiff's own negligence will not bar a recovery unless it existed as a concurrent, co-operating proximate cause of the injury. (Citing Montana case.) Thus it is clear that the key to liability is: what act or acts of negligence constitute the proximate cause of the injury, without which it would not have occurred? All other acts of negligence become immaterial.

"Presupposing, then, that both plaintiff and defendant are guilty of negligence and thereafter the

plaintiff remains passive and oblivious to his danger, and the defendant, after discovering the perilous situation of the plaintiff, could have avoided the accident by the exercise of reasonable care but did not employ the means at his command to avoid it, there is a break in the sequence of events and defendant's last act of negligence becomes the sole proximate cause of the injury, while his initial negligence and the primary negligence of the plaintiff become but remote causes thereof. (Citing Montana cases.)

“Here, knowledge and appreciation of plaintiff's peril in time to avoid the threatened injury, has been said by this court to be necessary in order to invoke the doctrine under consideration. (Citing Montana case.) *Even here the doctrine of contributory negligence is applicable*, (Italics supplied) and if the negligence of plaintiff concurs as a proximate cause up to and at the time of the accident, the last clear chance doctrine does not apply, since defendant's subsequent negligence is not then the *sole* proximate cause of the injury. (Citing Montana case.) If the plaintiff could, at the last, have avoided the injury by the exercise of reasonable care, in spite of the subsequent negligence of the defendant he has failed to embrace ‘the last clear chance’. \* \* \*” (85 Mont. 618-619.)

Appellant has abandoned his objections to Defendant's Special Request No. 13. At the time of trial he urged on the trial court the Montana case of *Yergy v. Helena Light & Ry. Co.*, 39 Mont. 2399, 102 Pac. 317 (T. 360). In that early case, the court did not condemn or deny the defense of concurring contributory negligence. The court said in part:

“We are of opinion that all the instructions, taken together, left the jury free to consider the defense of contributory negligence, and that they must have understood from the instructions given that there

could be no recovery unless the doctrine of last clear chance could, under the testimony, be successfully invoked by the plaintiff."

There simply is no justification or authority for the conclusion drawn by appellant that the doctrine of contributory negligence is not applicable in Montana in a last clear chance case.

Although appellant states that he does not contend that Montana has extended the last clear chance doctrine to include the Humanitarian Doctrine (*Br. Pp. 23*), a doctrine condemned in the Montana Law Review article quoted above, the cases he cites are from Missouri which does follow that doctrine. We recognize that in Missouri, the Missouri court has held that no negligence of the plaintiff can be a defense under its Humanitarian Doctrine. Such cases have no significance in Montana which does not follow the Humanitarian Doctrine, particularly where the Montana court has held to the contrary. The situation peculiar to Missouri is succinctly stated as follows:

"Apparently in that state nothing short of intended suicide on the part of the injured person will prevent recovery against defendant chargeable with subsequent negligence as distinguished from primary negligence." (*171 A.L.R. at 413.*)

Accordingly, although appellant says that he does not contend that Montana has extended the last clear chance doctrine to include the Humanitarian Doctrine of Missouri (*Br. Pp. 23*), the cases he cites are from Missouri, and his argument in effect is that this court should reverse the Montana law as applied by the Montana court,

and adopt the Missouri law as applied by the Missouri court.

The A.L.R. article quoted above is of further interest in this case. It is a collected annotation of last clear chance divided into four categories of fact situations. The fourth category is the fact situation of this case—a negligently inattentive plaintiff. The article states:

“Fourth category: danger not actually discovered by defendant but ought to have been; injured person physically able to escape (Supplementing 92 ALB 128 and 119 ALR 1075.)

“It is stated in connection with footnote 69a of the comment note, in 92 ALR 128, and page 1075 of the supplementary annotation in 119 ALR, that the logical implication of the proximate cause view of the doctrine of last clear chance seems to require denial of its applicability in the situation hypothesized in this category and that the great weight of judicial authority is to that effect. Further support for denial of application of the doctrine upon the hypothesis of this category is furnished by later cases.” (171 A.L.R. at 403.)

We can simply paraphrase the opinion of this court in *Great Northern v. Taulbee*, above, and it should decide this case:

“Whether or not appellee also was negligent, or whether its negligence, if any, concurred with Feeley’s in causing the collision, it is unnecessary to decide. Feeley’s negligence, if not the sole cause, was at least a proximate cause of the collision. Whether it was the sole cause, or was a concurrent cause amounting to contributory negligence only, is immaterial. In either case, recovery is barred. Appellee’s motion for a directed verdict should have been granted.”

Under the identical Montana authority cited by appellant, the Montana law expressly recognizes continuing contributory negligence as a complete defense.

Under the undisputed evidence, under the Montana decisions, and under the decisions of this court, Feeley's continuing concurring negligence at least proximately contributed to cause his death. The directed verdict should have been granted.

### THERE WAS NO REVERSIBLE ERROR IN THE CHARGE TO THE JURY

The only basis of appeal to this court is alleged errors in the charge to the jury. Although we feel that appellee was entitled to a directed verdict, and that it is therefore unnecessary to consider this assignment of error with respect to the charge of the court, we respectfully submit that in any event there was no reversible error. If there was error, it was error in favor of the appellant for which the appellant cannot complain.

It is well to summarize a few basic rules with respect to the charge to a jury. In the first place, particular instructions cannot be singled out, but the charge must be considered together as a whole to determine whether upon the whole charge the jury could gather the proper rules to be applied.

No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, "stating distinctly the matter to which he objects and the grounds of his objection" (*Rule 51*).



Ordinarily, error will not be premised on the failure to give an instruction where the practice has not been followed of submitting a desired instruction to the court in writing in advance of the conclusion of the trial in order that the trial court may have an opportunity to review it. (*Swiderski v. Moodenbaugh*, 9th C.C., 143 F. (2d) 212.)

Specifications of error on grounds not presented to the trial court cannot be considered on appeal.

In these cases, the pleadings of the appellant, both complaint and reply, were bottomed solely on the doctrine of last clear chance, and the case was tried on the theory of last clear chance. The appellant did not offer orally, or in writing, any special requests or instructions defining, limiting, or including all of the elements of the doctrine of last clear chance, or any or all of the elements of the defense of continuing and concurring negligence. He contends there is no such defense. He did not offer instructions that would clarify the alleged errors, if any, in those instructions which were offered by the appellee and given by the court, nor did he point out distinctly to the court the matter within those instructions offered by the appellee and given by the court to which he objected. He was satisfied to offer a few instructions which adequately and fully covered his theory of possible liability to an approaching motorist, all of which were given. He cannot now place the trial court in error, assuming that there was error, for his own failure to offer full and complete instructions, for his own failure to point out to the court distinctly any matter that may have been erroneous-

ly included, or for his own failure to suggest to the court any additional matter that would clarify or amplify those given.

***a. PROPER CAUTIONARY INSTRUCTIONS WERE GIVEN.***

The jury was told to consider the instructions as a whole, each in the light of the other, and not to single out or decide the case on some particular instruction (*Def. Spec. Req. 1, T. 337*); to take the law of the case from court and the instructions of the court only (*Def. Spec. Req. 3, T. 337*). Preponderance of the evidence was defined (*Def. Spec. Req. 10 and 11, T. 341*); proximate cause was defined (*Def. Spec. Req. 12, T. 342*); negligence was defined (*Def. Spec. Req. 13, T. 342*); and circumstantial evidence was defined (*Plaintiff's Instruction No. 4, T. 353, and No. 13, T. 356*).

***b. THE CHARGE, CONSIDERED AS A WHOLE, COVERED THE ESSENTIAL ELEMENTS OF LIABILITY TO AN INATTENTIVE PLAINTIFF UNDER LAST CLEAR CHANCE.***

The basic elements of last clear chance that would permit recovery by a negligently inattentive plaintiff are set out above in the quotation of Section 480 of the *Restatement of Torts*. A negligently inattentive plaintiff can recover:

“\* \* \* if, but only if, the defendant

- a. knew of plaintiff's situation, and
- b. realized or had reason to realize that the plaintiff was inattentive and therefore unlikely to discover his peril in time to avoid the harm, and

- c. thereafter is negligent in failing to utilize with reasonable care and competence his then existing ability to avoid harming the plaintiff."

In our opinion, the elements required were fully covered when we read together, as we must, defendant's special requests 16 through 20 (*T. 343-345*), and plaintiff's offered instructions 9, 11, 12, 13 and 14 (*T. 354-357*). In connection with the position of peril or perilous situation, or position of danger, and the discovery thereof, the jury was told that it could consider circumstantial evidence (*Pl. Ins. 4 and 13, T. 353 and 356*); that the duty of the train crew did not arise solely when deceased was on the track, but also if his danger was apparent while he was approaching the track (*Pl. Ins. 12, T. 356*); that in determining whether the train crew saw the deceased in time to avert the injury, the jury could consider whether the crew was in a position from which they could have seen that the deceased was inattentive and unaware of the approaching train, and the train crew was presumed to have seen what was in plain sight to be seen (*Pl. Ins. 9, T. 354*). The jury was also told that they must find for the plaintiff and against the defendant even if the deceased could have observed the danger, if there was anything in his demeanor or conduct from which the train crew knew of the situation, and had reason to realize he was inattentive and unlikely to discover, or might not discover his peril; or if the train crew observed circumstances indicating a reasonable chance that deceased was inattentive and therefore in danger, or might not dis-

cover his danger, then the train crew was obliged to take reasonable steps to protect him (*Pl. Ins. 11, T. 355*). Furthermore, the jury was told that if circumstances indicated that the deceased was unaware of his danger, and the unawareness was discovered by the train crew in time to avoid the collision, "then *must find*" in favor of the plaintiff (*Pl. Ins. 11, 12 and 13, T. 355-357*). Finally, that signals were required of the train crew, and any failure to give them was negligence; but even if signals were given, if the train crew observed they were not heard by Feeley, or the train not discovered, they were required to give additional signals; that if they failed to give them, and giving them would have saved Feeley, "then you must return your verdict in favor of plaintiff" (*Pl. Ins. 14, T. 357*).

When you read the foregoing instructions offered by the plaintiff, and given by the court, in conjunction with the special requests offered by the defendant and given by the court, it seems clear that the jury was told that plaintiff could recover, even though inattentive and unaware, and even though at all times approaching the impact, if the defendant

- "a. knew of plaintiff's situation, and
- b. realized or had reason to realize that the plaintiff was inattentive and therefore unlikely to discover his peril in time to avoid harm, and
- c. thereafter was negligent in failing to utilize with reasonable care and competence the defendant's then existing ability to avoid harming the plaintiff."

c. *SPECIAL REQUESTS OFFERED BY THE DEFENDANT APPELLEE AND GIVEN BY THE COURT, DID CORRECTLY STATE THE LAW. IN ANY EVENT, APPELLANT IS IN NO POSITION TO COMPLAIN IN THIS COURT.*

The objections made by appellant to the crucial instructions offered by the defendant with respect to last clear chance and continuing contributory negligence (*Def. Spec. Req. Nos. 16-26, inclusive*), are set out at pages 361-364 of the Transcript. In our opinion, the appellant failed to state distinctly to the trial court the matter in the instructions to which he objected, or the grounds of objection, assuming they were objectionable. Furthermore, the plaintiff appellant failed to submit to the trial court, either orally or in writing, instructions that would correct the errors, if any, in those special requests, or that would clarify the additional matters which the appellant felt were either adequately covered, or erroneously covered. The objections are legally insufficient to warrant reversal.

*Swiderski v. Moodenbaugh, 9th C.C., 143 F. (2d) 212.*

*Tucker v. Loew's Theatre & Realty Corporation, 2nd C.C., 149 F. (2d) 677.*

*Armit v. Loveland et al, 3rd C.C., 115 F. (2d) 308.*

*Mill Owners Mutual Fire Insurance Company v. Kelly, 8th C.C., 141 F. (2d) 763.*

*Rule 51, Federal Rules of Civil Procedure.*

*Woodworkers Tool Works v. Byrne, 9th C.C., 191 F. (2d) 667.*

*Mutual Life Insurance Company v. Wells Fargo*

*Bank & Union Trust Company*, 86 F. (2d) 585, 9th C.C.

*Allison v. Standard Air Lines*, 9th C.C., 65 F. (2d) 668.

*Allen v. Nelson Dodd Produce Company*, 207 F. (2d) 296, 10th C.C.

*New York, New Hampshire & H. Railway Company v. Zermani*, 1st C.C., 200 F. (2d) 240.

*Fritz v. Pennsylvania Railroad Company*, 7th C.C., 185 F. (2d) 31.

*Hansen v. St. Joseph Fuel Oil & Manufacturing Company*, 8th C.C., 181 F. (2d) 880.

*Palmer v. Hoffman*, 318 U.S. 800, 63 S. Ct. 757.

In considering whether the charge to the jury as a whole advised the jury of the proper rules to apply, we call the attention of the court to the fact that the special requests offered by the defendant appellee covering both the elements of the doctrine of last clear chance, and contributory negligence continuing up to the moment of impact and concurring with the negligence, if any, of the defendant, were based substantially on the charge that was actually given to the jury by the trial court in the trial of the *Pollard* case, and considered by the Montana Supreme Court on the appeal in that case. We have obtained certified copy of that charge from the Clerk of the Montana Supreme Court, and extract therefrom is included in this brief as an appendix to assist the court in considering the charge. The court may likewise be interested to note that Judge Pray during the trial of this case considered over night what his charge would be (*T.* 329-330). His consideration included the transcript on

appeal in the *Pollard* case, and the charge in that case included herein in the appendix. The record in this case states:

“THE COURT: I am returning this transcript, Mr. Crowley.” (*T. 331*).

The transcript referred to was that of the transcript on appeal in the *Pollard* case.

We shall consider the specifications in the same order as in appellant's brief.

(1) The first part of Defendant's Special Request No. 17 (*T. 343*) is substantially identical with Instruction 9 of the *Pollard* case (*App., Pp. 4*). The only addition is a definition of zone of safety and position of peril as described in the *Holmgren* case, (*Pp. 29, herein*), Utah, and the *Lindley* case, Calif. (*Pp. 30, herein*), which are not objected to. The objection made was simply that it was misleading; an instruction for the helpless peril type of last clear chance, and not applicable in its entirety to the negligent inattention theory (*T. 361*). These grounds are general and do not comply with the requirements of Rule 51, or the decisions of this court. In any event the instruction must be read and considered together with Plaintiff's Instructions 4, 9, 11, 12, 13 and 14 (*T. 353-357*). Finally, appellant did not offer any instruction which he felt was proper.

(2) Defendant's Special Request No. 19, (*Tr. 344*), considered in conjunction with Plaintiff's Offered Instructions No. 9 (*T. 354*), No. 11 (*T. 355*), No. 12 and No. 13 (*T. 356*), and No. 14 (*T. 357*), cover the same

ground as Instructions 12 and 13 of the *Pollard* case (*App.*, *Pp.* 5, 6). The objection (*T.* 361) that it was an incorrect statement of the law and misleading is insufficient. By Plaintiff's Instruction 14 (*T.* 357) the jury were told that failure to give whistle or bell signals was negligence per se; that even if they were given, if any of the train crew observed they were not heard, or the train was not discovered, additional signals were required; and if the death could have been avoided if the signals were given, then their verdict *must* be for plaintiff (*T.* 357). Plaintiff's 3 (*T.* 353), which we think imposed a greater duty on appellee than the law requires, Plaintiff's 9 (*T.* 354), and Plaintiff's 11, 12, and 13 (*T.* 355-356) also fulfill the objections made. Again, appellant offered no instruction of his own to assist the court.

(3) Defendant's Special Request No. 20 (*T.* 345) is word for word the last half of Instruction 10, *Pollard* case (*App.* 4). The first half of Instruction 10, *Pollard* case, is Defendant's Special Request No. 18, objection to which has been abandoned (*T.* 344, *App.* 9). The single instruction of the *Pollard* case was simply divided into two instructions. The same comments pertain here concerning reading the instructions along with those of plaintiff and the other special requests.

(4) Defendant's Special Request No. 21 (*T.* 345) on continuing and concurring contributory negligence is substantially the last half of Instruction No. 11 of the *Pollard* case (*App.*, *Pp.* 5). The appellant specifies



as error grounds not given to the trial court. (*Br. Pp. 7; T. 362*). The objection made is substantially that there can be no defense of contributory negligence in a case of last clear chance (*T. 362*). The objection was neither sufficient, nor sound.

(5) Defendant's Special Request No. 22 (*T. 346*) is identical with Instruction No. 14, Pollard case (*App., Pp. 6*), and must be considered in conjunction with Defendant's Special Request No. 21 (*T. 345*). The appellant specifies as error grounds not presented to the trial court (*Br., Pp. 8, T. 363*). The objections that there can be no such defense, that it is misleading, and an incorrect statement of the law, are simply general and legally insufficient as well as unsound. (*T. 363*.)

(6) Defendant's Special Request No. 23 (*T. 346*) is substantially identical with Instruction No. 15 Pollard case (*App. Pp. 7*). Appellant specifies grounds not presented to the trial court (*Br., Pp. 9; T. 363*). The instruction must be considered along with Request 21 (*T. 345*). The objection that it is an incorrect statement of the law, applies only to primary negligence, confusing, misleading, and not applicable, are not sufficient objections. Furthermore, appellant did not offer what he would consider a correct charge, nor point out distinctly the matter in the charge to which he objected, nor in what way the court should modify or restrict the instruction.

(7) Defendant's Special Request No. 24 (*T. 347*) is

identical with Instruction No. 16, Pollard case (*App.*, *Pp.* 8). Again, only a general objection was made that it assumes facts not in evidence, and therefore was misleading; that it was inapplicable in an inattentive motorist situation, and could be given only in a primary negligence case (*T.* 363). These objections do not comply with Rule 51. Furthermore, when read with plaintiff's instructions 3, 9, 12, 13, and 14 (*T.* 353-357), the objections have no merit.

(8) Defendant's Special Request No. 25 (*T.* 349) was based upon *Grant v. C.M.*, 78 *Mont.* at 112-113; *Heintz v. So. Pac.*, *Cal.*, 147 *P.* (2d) at 621; and *Incret*, 107 *Mont.* at 414. It must, of course, be read and considered with all instructions. Appellant specifies grounds of error not presented to the trial court. He inadvertently overlooked setting out the objections in his brief (*Br. P.* 12). His objection was simply for the same reason he objected to Request 24, and the same comments are pertinent (*T.* 364).

(9) Appellant apparently inadvertently overlooked specifying error as to Defendant's Special Request No. 26 but did include the transcript objections to it (*Br. Pp.* 13). Defendant's Request No. 26 (*T.* 349), was based upon Instructions 10 and 12 of the Pollard case (*App.*, *Pp.* 4, 5); the comments to *Section 480, Restatement of the Law of Torts*; the *Holmgren case*, 198 *P.* (2d) 459 (*Pp.* 29, *herein*); the *Lindley case*, *Calif.*, 64 *P.* (2d) 490 (*Pp.* 30, *herein*); and *N. P. v. Haugan*, 8th *C.C.*, 184

*F. (2d) at 477*, which approves this instruction:

"The court instructed the jury in part as follows: 'The employees of the defendant had a right to assume that persons in the act of crossing its railroad would use ordinary care for their own safety; and, when a train was in sight of a grade crossing, that persons approaching on a public street or highway would stop.' "

The objections were simply general—incorrect statement of the law; the trainmen must act as reasonably prudent men when they have discovered an inattentive motorist; the instruction considers only ordinary negligence, that is primary negligence type case, and does not contemplate an action under last clear chance (*Br. Pp. 13, T. 364*), and legally insufficient.

(10) Appellant's specification of error numbered 9 (*Br. Pp. 13*) was not made to the trial court and cannot be considered here.

#### *d. SUMMARY.*

We respectfully submit that the instructions when read together adequately cover all the elements of last clear chance that appellant desired, or now insists upon; that the defendant's special requests correctly stated the Montana law; but that in any event, the objections of the appellant did not comply with Rule 51, and appellant did not offer in writing what he considered to be proper instructions, and he is in no position to complain in this court.

### CONCLUSION

We respectfully submit the judgment should be affirmed for two reasons:

- (1) Under the undisputed facts, and the undisputed state of Montana law, appellee should have been granted a directed verdict.
- (2) The charge to the jury, considered as a whole, gave to the jury the proper rules to be applied. There was no reversible error, if any error, in the charge.

Respectfully submitted,

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APPENDIX

*INSTRUCTIONS GIVEN AND RETURNED  
IN POLLARD CASE*

THE COURT: I will say to you, gentlemen of the jury, in the beginning, that the first cause or count set forth in the complaint has been withdrawn from your consideration, and this case is to be determined only on the issues presented by the second cause or count set forth in the complaint, and the answer thereto and the reply.

INSTRUCTION No. 1

You are instructed that in civil cases the affirmative of the issues must be proved, and that when the evidence is contradictory the decision must be made according to the preponderance of the evidence; and that in this case it devolves upon the plaintiff to prove his claim by a preponderance of the evidence, and if you find that plaintiff has failed to prove his claim by a preponderance of the evidence, your verdict must be for the defendant.

(Given. F. L. R., Judge)

INSTRUCTION No. 2

You are instructed that the burden is on the plaintiff to prove by a preponderance of the evidence not only that the defendant was guilty of some act of negligence alleged in the second count of the complaint, but also that except for such negligence on the part of defendant the accident would not have occurred. In the absence of proof the presumption of law is that the defendant was not guilty of any negligence, and the mere fact that an accident occurred does not of itself create any presumption of any negligence on the part of the defendant.

(Given. F. L. R., Judge)

## INSTRUCTION No. 3

By a preponderance of the evidence is meant the greater weight. The preponderance of evidence in a case is not alone determined by the number of witnesses testifying to a particular fact, or state of facts. In determining upon which side the preponderance of evidence is, the jury should take into consideration the opportunities of the several witnesses for seeing or knowing the things about which they testify; their conduct and demeanor while testifying; their interest or lack of interest, if any, in the result of the suit; the probability or improbability of the truth of their several statements, in view of all the other evidence, facts, and circumstances proved on the trial, and from all these circumstances determine upon which side is the weight or preponderance of the evidence.

(Given. F. L. R., Judge)

## INSTRUCTION No. 4

You are not bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction in your minds against a less number or against a presumption, or other evidence satisfying your minds. You are further charged that a witness false in one part of his testimony is to be *distrusted* in others.

(Given. F. L. R., Judge)

## INSTRUCTION No. 5

The jury are instructed that negligence is the failure to do what a reasonable and prudent person would ordi-

narily have done under the circumstances of the situation, or doing what such person under the existing circumstances would not have done.

(Given. F.L.R., Judge)

INSTRUCTION No. 6

The Court instructs the jury, that the proximate cause of an injury is that which in a natural and continuous sequence, unbroken by any new independent cause, produces the injury, and without which the injury would not have occurred.

(Given. F.L.R., Judge)

INSTRUCTION No. 7

Contributory negligence, in its legal signification, is such an act or omission on the part of plaintiff amounting to a want of ordinary care as, concurring or co-operating with the negligent act of the defendant, is a proximate cause or occasion of the injury complained of.

(Given. F.L.R., Judge)

INSTRUCTION No. 8

You are instructed that the plaintiff in this case, on the 17th day of January, A.D. 1928, had as much right as the defendant to the use of the crossing mentioned in plaintiff's complaint. Their rights to the use of the crossing were equal, and it was the duty of both plaintiff and defendant to use said crossing for the purpose for which it was intended so as not to unduly or unreasonably interfere with the proper use thereof by the other.

(Given. F.L.R., Judge)

## INSTRUCTION No. 9

You are instructed that to make the doctrine of the last clear chance applicable, three elements are indispensable, namely: (1) the exposed condition of the plaintiff, brought about by his own negligence; (2) the actual discovery by the defendant of the perilous situation of the plaintiff in time to avert the injuries complained of, if any; and (3) the failure of the defendant thereafter to use ordinary care to avert said injuries. All of these elements must concur, otherwise the doctrine has no application; and if you find from a preponderance of the evidence that any one or more of such elements is lacking, the plaintiff cannot recover under the doctrine of the last clear chance.

(Given. F.L.R., Judge)

## INSTRUCTION No. 10

You are instructed that the duty imposed by the last clear chance doctrine is not to use ordinary care to discover the peril and also to avert the threatened injury, but to use ordinary care to avert the injury after the perilous situation is actually discovered; therefore, any negligence of defendant's servants in charge of said train prior to the time plaintiff was actually discovered in a position of peril has no bearing on the question of liability in this case and must not be considered by you in arriving at your verdict; and if you find from a preponderance of the evidence that, after the actual discovery of plaintiff in a position of peril, if you find he was in a position of peril, the engineer in charge of said train exercised rea-



sonable care to avert said injuries to plaintiff, your verdict must be for the defendant.

(Given. F.L.R., Judge)

INSTRUCTION No. 11

You are instructed that the only theory on which plaintiff may recover herein is that of the last clear chance doctrine, as defined and limited in these instructions; and if you find from a preponderance of the evidence that plaintiff has failed to prove all of the essential elements of that doctrine your verdict must be for the defendant. If you find from the evidence that plaintiff was guilty of negligence contemporaneous, concurrent, continuous, and contributory with that of the defendant up to and producing the injury, the doctrine of the last clear chance has no application and plaintiff cannot recover, and in that event your verdict must be for the defendant.

(Given. F.L.R., Judge)

INSTRUCTION No. 12

You are instructed that before plaintiff can recover herein it is incumbent upon him to prove by a preponderance of the evidence that the trainmen in charge of the train failed to use ordinary care to avert the injuries complained of, if any, after they actually discovered plaintiff in a position of peril and apparently unconscious of his danger or unable to extricate himself therefrom; and if you find from a preponderance of the evidence that, after the trainmen in charge of the train discovered plaintiff in a position of peril the train could not have been stopped by the exercise of ordinary care, in time to have averted

the accident, your verdict must be for the defendant.

(Given. F.L.R., Judge)

### INSTRUCTION No. 13

The jury are instructed that if you find from a preponderance of the evidence in this case that the engineer in charge of defendant's train, at the time mentioned in plaintiff's second cause of action, was in a position where he could have seen plaintiff's truck stalled upon the railway crossing, if you find it was so stalled, this is a circumstance you may take into consideration in determining whether or not the servant of defendant, its engineer, saw the plaintiff in time to have averted the injuries complained of by the plaintiff. The law presumes that a person looking down the track in the position of the engineer, if you find he was looking down the track, should have seen what was in plain sight to be seen.

(Given. F.L.R., Judge)

### INSTRUCTION No. 14

You are instructed that if you find from the evidence that if plaintiff, had he looked and listened, ought to have heard the warnings and signals of the train, if any were given, and that if he had exercised reasonable care he would have heard said warnings and signals, if any were given, and would have seen the locomotive and heard the noise created by the rapidly moving train, in time to avoid the accident, then and in that event your verdict should be for the defendant.

(Given. F.L.R., Judge)

## INSTRUCTION No. 15

You are instructed that all persons driving motor vehicles upon the public highways of this state, outside of corporate limits of incorporated cities or towns, where the view is obscure, or when a moving train is within sight or hearing, shall bring said vehicle to a full stop not less than ten nor more than one hundred feet from where said highway intersects railroad tracks within this state before crossing the same, at all crossings where a flagman or a mechanical device is not maintained to warn the traveling public of approaching trains or cars; and if you find from a preponderance of the evidence that the crossing involved in this case is outside the corporate limits of any incorporated city or town, and you further find that no flagman or mechanical device was at the time of said collision maintained at said crossing to warn the traveling public of approaching trains or cars, and if you find that said train was moving within sight or hearing of plaintiff and you further find that plaintiff failed to bring his truck to a full stop not less than ten nor more than one hundred feet from where said highway intersects said railroad tracks, and you further find from a preponderance of the evidence that plaintiff's failure to so stop his truck was a proximate cause of the injuries, if any, sustained by him, he is guilty of contributory negligence, and cannot recover and your verdict must be for the defendant.

(Given. F.L.R., Judge)

## INSTRUCTION No. 16

You are instructed that the presence of a railroad track is of itself a warning of danger; a person approaching a railroad crossing is required to take all reasonable precautions to assure himself by actual observation that there is no danger from an approaching train; the failure of the persons in charge of the train to keep a lookout or to give warning signals of its approach to the crossing does not relieve the traveler of the necessity of making a vigilant use of his senses to ascertain whether it is safe to proceed onto said crossing; the traveler must use ordinary care to make his looking and listening reasonably effective, and whenever there is a zone of safety within which a traveler upon a highway may, by looking and listening and stopping, if need be, to ascertain the presence of an on-coming train, it is his duty to make his observation within such zone; if he proceeds from a place of safety regardless of an approaching train of which he has knowledge, or if he leaves the place of safety without having made a vigilant use of his senses to discover a danger which is present and could have been seen from such place, then it will be held to be his negligence which is the proximate cause of the injury resulting from a collision, regardless of circumstances tending to show negligence on the part of the railroad operators. When a train is at a point which is within the traveler's vision while he is in a place of safety, he will be deemed either to have seen it and proceeded regardless of the danger, or to have failed to make a vigilant use of his senses.

Therefore, if you find from a preponderance of the evidence in this case that, when plaintiff was in a place of safety, the train was at a point on said track within plaintiff's vision and having seen the approaching train or having failed to make a vigilant use of his senses to discover the same, he entered the crossing in front of the approaching train when it was too late for the engineer in charge of said train, by the exercise of reasonable care, to avert a collision between the train and the truck which plaintiff was driving, plaintiff cannot recover and your verdict must be for the defendant.

(Given. F.L.R., Judge)

#### INSTRUCTION No. 17

For the breach of an obligation not arising from contract, the measure of damages is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not.

(Given. F.L.R., Judge)

#### INSTRUCTION No. 18

You are instructed that if, under all of the evidence and all of the instructions of the Court, your verdict be for the plaintiff and against the defendant, then you will assess and write into that verdict the amount of the damages which plaintiff should recover. In determining this amount, you may consider the extent of his injuries, if any; the pain and suffering of plaintiff as a result of such injuries, if any, in mind and body; and in determining the amount of the damages, you may also take into consideration the reasonable cost of hospital expenses,

nurses' services, and doctor's fees, and the loss of wages, if any, suffered by the plaintiff as a result of his injuries, but in no event, however, shall your verdict be for a sum exceeding the sum of Twenty Nine Hundred (\$2900.00) Dollars.

(Given. F.L.R., Judge)

(Filed: March 26, 1931.)

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(Instructions Refused)

INSTRUCTION No. 19

Gentlemen: This action invokes what is commonly known as the last clear chance doctrine, and you are now being instructed as to what is necessary for the plaintiff to prove by a preponderance of all of the evidence before he can recover under the last clear chance doctrine.

In order for the plaintiff to recover under this doctrine you are instructed that you must find from the evidence:

1. That the exposed or perilous condition or situation of plaintiff's truck on the railroad crossing was brought about by his own negligence.

2. That the defendant, through its servants in control of the engine actually discovered the perilous situation of the truck upon the crossing, or in the exercise of ordinary care and diligence should have seen and discovered the perilous situation of the truck upon the said crossing in time to have stopped its engine and cars and to avoid colliding with the said truck; and,

3. That the defendant, through its said servants in control of the engine and cars after so discovering the

truck in a perilous position or situation upon the said crossing or in the exercise of ordinary care and diligence should have discovered the said truck in a perilous and dangerous position or situation upon the said crossing, and failed to use ordinary care to stop the said engine and cars in time to avoid colliding with the truck. All of these elements must concur before the last clear chance doctrine has any application.

(Refused. F.L.R., Judge)

#### INSTRUCTION No. 20

If by a preponderance of all of the evidence in this case you believe that the defendant, through its servants, discovered the plaintiff's position of peril on the crossing, or in the exercise of ordinary care should have discovered the plaintiff's position of peril on the crossing while the defendant, through its servants, in control of the engine, still had time to stop the engine and cars and avoid the collision with the truck and that thereafter the defendant failed to use ordinary care to bring its engine and cars to a complete stop and avoid the collision, then your verdict should be for the plaintiff and against the defendant.

(Refused. F.L.R., Judge)

#### INSTRUCTION No. 21

You are instructed that when a train is within a traveler's vision while he is in a place of safety, he will be deemed either to have seen it and acted regardless of the danger, or to have failed to make a vigilant use of his senses; and in this case, if you find, from a preponderance

of the evidence, that the train was within plaintiff's vision while he was in a place of safety and he proceeded onto the crossing in front of the approaching train, your verdict must be for the defendant; and you are further instructed that if you find from the evidence that the truck which plaintiff was driving stalled on the crossing in front of the approaching train, and that said train was within plaintiff's vision while it was a sufficient distance west of said crossing to permit plaintiff to have alighted from said truck and gotten to a place of safety away from the track before said train reached the crossing, your verdict must be for the defendant.

(Refused. F.L.R., Judge)

#### INSTRUCTION No. 22

You are instructed that the doctrine of the last clear chance has no application to a situation where by mutual carelessness an injury ensues to one of two parties. In other words, the doctrine of last clear chance excludes from the operation of its underlying principle every case wherein it may be said that the negligence of the injured party was contemporaneous, concurrent, continuing and contributory with the negligence of the party inflicting the injury; and if you find from the evidence that plaintiff, when his truck stalled on the crossing, if you find that it did so stall on said crossing, was in a position to help himself, and by a vigilant use of his eyes, ears, and physical strength, could have extricated himself and retreated to a place of safety and thereby avoided the injuries, if any, complained of, his act in remaining in said



truck on said crossing in front of the approaching train until it was too late to avert said injuries, was negligence on his part, and if you find from the evidence that such negligence of the plaintiff, if any, was contemporaneous, concurrent, continuous, and contributory with that of the defendant up to and producing the injury, the plaintiff cannot recover, and your verdict must be for the defendant.

(Refused. F.L.R., Judge)

INSTRUCTION No. 23

You are instructed that if you find from a preponderance of the evidence that the truck which plaintiff was driving stalled on said crossing and that plaintiff remained in said truck on said crossing, attempting to repair or remove said truck when the approaching train was in clear view and when the said train would and could have been seen by plaintiff in ample time for him to have alighted from said truck and retreated to a place of safety, had he been keeping a proper lookout for approaching trains, plaintiff's failure then and there to keep such a lookout for approaching trains, if you find he did so fail to keep such a lookout, is contributory negligence on his part, and if you find that such negligence of the plaintiff, if any, was contemporaneous, concurrent, continuing and contributory with that of the defendant, if any, up to and producing the injuries complained of, if any, the plaintiff cannot recover, and your verdict must be for the defendant.

(Refused. F.L.R., Judge)

## INSTRUCTION No. 24

You are instructed that whenever the surrounding circumstances make the story of a witness highly improbable or incredible, or whenever the testimony is inherently impossible, and the physical conditions point so unerringly to the truth as to leave no room for a contrary conclusion, based on reason or common sense, that under such circumstances the physical facts are not affected by sworn testimony, which in mere words conflicts with them, and therefore, in this case if you find from the evidence that the physical facts are such that if the plaintiff had looked at any point when he was in a position of safety before entering said crossing he could have seen the train, and the train was on the track within plaintiff's vision, running in an easterly direction toward said crossing, and plaintiff entered said crossing in front of the approaching train too late to avoid being struck by said train, he cannot recover and your verdict must be for the defendant; and you are further instructed that if you find from the evidence that the physical facts are such that if, when the plaintiff's truck stalled on the crossing, if you find that it did so stall on the crossing, the train was on the track 600 yards or more west of the crossing running in an easterly direction toward said crossing, and could have been seen by the plaintiff had he looked, and plaintiff remained in said truck on said crossing without making any effort to discover the approaching train or to alight from said truck and get off the track to a place of safety until it was too late to avoid being struck by the

train, then and in that event plaintiff cannot recover and your verdict must be for the defendant.

(Refused. F.L.R., Judge)

(Filed: March 26, 1931.)



# In the United States Court of Appeals

For the Ninth Circuit

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G. V. FEELEY, AS ADMINISTRATOR OF THE  
ESTATE OF GEORGE A. FEELEY, DECEASED,  
Appellant,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,  
A CORPORATION,  
Appellee.

---

## Reply

Brief of G. V. Feeley, Administrator  
as Appellant

---

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# In the United States Court of Appeals

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Appellee.

---

**Brief of G. V. Feeley, Administrator  
as Appellant**

---

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# In the United States Court of Appeals

For the Ninth Circuit

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No. 14698

G. V. FEELEY, AS ADMINISTRATOR OF THE  
ESTATE OF GEORGE A. FEELEY, DECEASED,  
Appellant,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,  
A CORPORATION,  
Appellee.

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Upon Appeal from the United States District Court for  
the District of Montana

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The Brief of G. V. Feeley as Administrator of the  
Estate of George A. Feeley, Deceased

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THE CASE IS NOT BASED ON PRIMARY  
NEGLIGENCE

The respondent is concerned primarily with an attempt  
to impress the court, that this was an ordinary negligence

action and that the usual defenses against a negligent plaintiff were available. We submit that the inferences to be drawn from the first twenty-two pages, while perhaps not intentionally so, are misleading and erroneous, because the first twenty-two pages are concerned with cases based on facts which the appellant has conceded, they being that the decedent was in fact, negligent.

On page twenty-two of the respondent's brief it is stated that the theory of the last clear chance is not applicable, and in support of this argument they cite the case of *Collins vs. Crimp*, 91 Mont. 326, 8 Pac. (2d) 796. That case was not the same as the instant case in that it dealt with a helpless peril situation where the facts obviously indicated that there was no last clear chance to avoid the accident. Further, statements by the respondent indicated on page twenty-seven of its brief that in order to recover in a "negligent inattention situation," that it is necessary that the plaintiff be in a position upon the tracks and that he not be approaching the tracks. We do not believe that is the law in Montana and in support of that statement we refer the court to *Sorrels vs. Ryan*, 91 Mont. 326, 281 Pac. (2d) 1031, a recent Montana case decided on the "discovered inattention" theory of last clear chance. We quote from context:

"It is fairly inferable from the allegations of plaintiff's complaint that he stepped into the danger zone from westbound traffic the moment that he crossed the center line of the highway. He was struck after walking 15 feet past the center line. While it is not alleged how fast plaintiff was walking it is fair to

assume that he did not exceed the usual gait of about three miles per hour. The automobile, which was traveling 15 miles per hour, in order to reach the point of impact would have traveled about 75 feet after plaintiff had stepped into its lane of travel. *Under these circumstances it would be for the jury to say whether defendant had the last clear chance to avoid the injury.*" (All emphasis ours.)

On page twenty-eight of the respondent's brief, a case dealing with primary negligence was cited in support of its argument that the theory of last clear chance doesn't apply. We do not believe the case is in point. The Utah case of *Van Wagoner vs. Union Pacific Railroad* 186 Pac. (2d) 293 was pleaded on the theory of primary negligence. (See page 294.) Further, the facts of the case clearly revealed that there was no last clear chance in the case due to the time element.

The case cited on page thirty-four and quoted on page thirty-five of the respondent's brief indicates that the only way that a defendant in a case such as this, can avoid injury, would be to stop the train. We submit that this is not true, and that *it should be obvious to anyone that an accident of this nature can be avoided by merely ringing a bell or blowing a whistle, and thereby warning the approaching motorist that he is in peril, and giving him an opportunity to either stop his car or turn it away from the path of the imminent collision. Further, we believe that completely stopping the train would not have been necessary; merely slowing the train may have been enough.*

It is our belief that cases cited in respondent's brief,

page twenty-two to thirty-seven are not applicable to the facts in this case and apply only where the facts definitely indicate that there was never a last clear chance to avoid the accident. Further, while some of the cases indicated that a similar factual situation was considered, none seemed to discuss the Montana rule permitting defendant's discovery of plaintiff's negligent inattention to be established by circumstantial evidence.

On page thirty-seven of the respondent's brief, it is urged that the continuing contributory negligence bars recovery. This is, we think, an inaccurate statement of the law, so far as it pertains to the instant case. The theory of last clear chance applies in the following situations:

(1) The discovered helpless peril (i.e. physical helplessness) of the injured person regardless of the place of injury.

(2) The undiscovered helpless peril (i.e. physical helplessness) of the injured person at a place where defendant is under a duty to keep a lookout as at railroad crossings.

(3) The discovered negligent inattention (i.e. mental obliviousness) of the injured person regardless of the place of injury.

We submit that if the statements in the respondent's brief were true, there could be no recovery in a situation such as ours, where it appears that there has been an actual discovery of an inattentive plaintiff in time to avoid injuring him. This would be completely contrary to the theory of recovery set forth in the "Doichinoff" case.

Further, in this respect, it should be noted at page twenty-six, Montana Law Review, Spring 1944, that the "Neary" and "Doichinoff" cases are held not to be affected by the theory of continued negligence because there was actual discovery of the negligent plaintiff in those cases. It seems clear, therefore, in the light of these cases, that discovery of a negligently inattentive plaintiff is a basis for recovery in the State of Montana and that the theory of continuing negligence does not apply to this situation. It is further stated in our Montana cases that *this actual discovery of a negligently inattentive plaintiff can be established by circumstantial evidence.*

The following statement from Doichinoff vs. Chicago M. & St. P. Ry. Co., 51 Mont. 582 154 Pac. at pages 926 and 927 should clarify that point:

"It is true that there is not in this record any direct evidence that Koleff was actually discovered by the enginemen in time to avoid the accident; *but the fact may be established by circumstantial evidence.* If, in this instance it had been made to appear that Koleff was walking upon the railroad track in broad daylight, 200 feet or more in advance of Middleton's locomotive, that he was apparently unaware of danger, that the view from the locomotive was entirely unobstructed, that the enginemen were at their respective posts of duty on the locomotive, and were keeping a lookout ahead in the direction of Koleff, that the locomotive could have stopped within from 10 to 30 feet, considering the speed at which it was moving, no one would question the right of a jury to say that Koleff's position was discovered in ample time to avoid striking him, even in the face of positive testimony of the enginemen that they did not see

him at all until he was struck. In other words, *a particular combination of circumstances may be more convincing than direct evidence, whose probative force depends upon the veracity of witnesses more or less interested.* While the case presented by the evidence before us is not so complete as in the supposititious case above, we think it is sufficient to justify the verdict." (All emphasis ours.)

While perhaps many of the statements contained here may be somewhat repetitious, it is nevertheless clear that the following is a concise and accurate statement of the law and the facts of this case:

(1) An action was filed, wherein plaintiff alleged that an individual was killed by a train which was managed by servants of the defendant who had discovered that individual's inattentiveness and peril in time to avoid injuring him, but did nothing to warn him or to avoid injuring him. The result was that a man was killed. Whether or not a discovery was made in time to avoid injury can be established by circumstantial evidence. The following are some of the facts that seem to be pertinent in this case in establishing that there was sufficient evidence of discovered inattention to warrant submission of the case to the jury.

### FACTS

The evidence reveals that the railroad ran east and west, (tr. 36) and that the dirt road travelled by Mr. Feeley ran north and south (tr. 42, tr. 37) that the train was going east (tr. 154) and that the accident occurred at about sunset, (tr. 53) indicating that the driver of the jeep in order to see the train might very likely have been



hampered by the rays of a setting sun to the west or by the poor visibility of early twilight.

Even though our case was largely established by employees of the defendant, who were, at best, hostile witnesses, the evidence reveals that the conductor, Clarkin (tr. 198), and the fireman, Becker (tr. 207-210) saw the jeep approaching the track but did nothing to avoid injuring the driver of the jeep, in fact, they did nothing at all until the jeep was hit. (tr. 297.)

The evidence was to some extent conflicting; the fireman who was on the side of the engine toward which the jeep was approaching was, according to his testimony, (tr. 214) looking back when the collision occurred, (tr. 297), yet it is indicated that at the time immediately after the accident, the fireman was wringing his hands and was incoherent, (this is not denied), indicating he watched the jeep approach, knew of the deceased's inattentiveness, but had done nothing until it was too late.

It is for the jury to decide whether or not the men in charge of the train coming from the west when the sun was at or near the horizon, were aware of Feeley's inattentiveness which was apparently brought about by the fact that one looking in the direction of the train may have been blinded by the setting sun or hindered in visibility by early twilight.

In view of the fact that there is no evidence revealing that there was not a last clear chance to avoid injury to the decedent, we believe that the evidence indicating Mr. Feeley's inattentiveness was discovered in time to avoid

injuring him was sufficient to go to jury. It is for a jury to determine, whether they thought Mr. Becker was looking back when a car was approaching his side of the train (Tr. 213-220) (a somewhat unlikely story in view of his duty to keep a lookout) (tr. 220) or whether they thought he actually watched the jeep approaching the train, was aware of Feeley inattentiveness, and still failed to act. This would seem to be the more likely conclusion in view of his "hand wringing" and incoherence after the accident. The evidence seems to be without question that although the fireman had a bell cord near him and could have rung the bell to warn the deceased, that he did nothing at all to warn the deceased (Tr. 213).

(2) There was only *one* cause of action alleged and that was based on the facts heretofore stated. This cause of action alleged discovery of a mentally inattentive plaintiff in time to avoid injuring him. *Negligence of the decedent was admitted and alleged, so there was no issue of contributory negligence in the case.*

(3) Even though the issue of contributory negligence was never in the case, instructions on primary negligence were submitted to the jury.

(4) Where the issue is last clear chance, Montana cases unanimously agree that contributory negligence is no issue (see the "Doichinoff" case and also see Sorrels vs. Ryan, 28 Pac. (2d) 1031).

(5) Yet, even though negligence was admitted, misleading and erroneous instructions denying recovery, if

the plaintiff was negligent, were submitted. There is no way that instructions on primary and contributory negligence can be reconciled with instructions on last clear chance. The result was that the instructions which were submitted on this theory considerably confused and mislead the jury and resulted in prejudicial and reversible error being committed in this case. As stated before, we do not pretend to come under the theory of recovery set out in the Humanitarian Doctrine. (If the Humanitarian Doctrine were applicable we would have been permitted recovery even though there was no evidence of discovery of the negligently inattentive plaintiff at the crossing.) Notwithstanding these differences in the extension of the *duty* in the two theories, the basic theory remains the same in last clear chance and in the humanitarian doctrine. This basic theory is that the initial negligence of the plaintiff is admitted in the pleadings and the case is tried and goes to the jury on whether or not steps were taken by the defendant to avoid injury of the plaintiff notwithstanding his original negligence. In both cases whether it be the Humanitarian Doctrine or Last Clear Chance Doctrine, unless there are other allegations, we believe it correct to say that any theory of negligence other than last clear chance, is not only surplusage, but is misleading and confusing to the jury.

In conclusion, we urge that the court read and consider the cases cited on page twenty-four of appellant's original brief, not with the thought in mind that we are attempting to extend the *duty* of a defendant to a negligent plain-

tiff, but to see by way of illustration what we consider the proper handling of the situation where instructions were permitted which deny recovery to a negligent plaintiff in a case where that negligence has already been admitted both in the pleadings and proof and recovery is not sought on any theory of negligence other than last clear chance, or as in those cases, the Humanitarian Doctrine.

A typical statement in the support of our argument may be found in the case of *Willhauck v. Chicago R. I. & P. Ry. Co.*, 61 S.W. 2d 336, 332 Mo. 1165, wherein the following statement may be found:

“This cause was submitted only on the charge of negligence under the Humanitarian rule. Plaintiff’s contributory negligence is no defense to such a charge, and where no other ground of negligence is submitted it is not an issue in the case, and we have frequently held that its injection under these circumstances by an instruction such as above is confusing to the jury and prejudicially erroneous.”

It should appear obvious to anyone reading the instructions cited as erroneous in our original brief and comparing them with the instructions which were submitted by the plaintiff in this case on the theory of last clear chance, that there is no way that instructions on the theory of primary negligence can be reconciled with instructions on the theory of last clear chance. Submitting the two sets of instructions to a jury can only result in confusion. It is our belief that no cautionary instructions, no matter how well or carefully worded, can overcome this inherently confusing situation. We believe that while the courts of Montana have never had to pass directly on

this point; that they have always recognized that a contributory negligence instruction need not be submitted in a case where the only issue is last clear chance.

In support of our statement we refer this court again to the "Sorrell's" case which at 281 Pac. (2d) 1031 states as follows:

"Some of them are cases where the injured person ran suddenly ahead of the oncoming vehicle where the driver had no opportunity to avoid the injury; some discuss the question of the sufficiency of the evidence to warrant recovery which is premature so far as this case is concerned; *others discuss the effect of contributory negligence, a question not involved here because the plaintiff readily admits that he was guilty of contributory negligence.*"

For a further statement in support of our contention that Montana law is in accordance with the Missouri statement, we refer the Court to the Dochinoff case, 154 Pac. 926.

*"Defendants' offered instructions B and C might have been pertinent upon the issue of Koleff's contributory negligence; but in this instance there was no such issue. Plaintiff's last clear chance theory has its origin in the concession that Koleff was guilty of negligence in the first instance. (Dahmer vs. Northern Pacific Ry. Co.)"*

It has been suggested that the objections to defendant's offered instructions were not definite and specific enough. In reply to this we ask the Court, how could an objection be more specific? We stated that the instructions on primary negligence were not applicable to a last clear chance case and would result in confusing the jury. That, we

believe, was a clear cut and accurate statement of error and the reason for this appeal.

### CONCLUSION

The judgment should be reversed for the following reasons:

(1) Primary negligence instructions cannot be properly submitted in a case where the only issue is last clear chance.

(2) The only issue was last clear chance. Because the instructions on last clear chance and primary negligence are basically irreconcilable, the jury was confused and misled, and could not possibly have based a verdict on the instructions submitted in this case.

Respectfully submitted,

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No. 14,699

**United States Court of Appeals  
For the Ninth Circuit**

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JAMES L. KEEHN,

*Appellant,*

VS.

ALASKA INDUSTRIAL BOARD, BELLING-  
HAM CANNING Co. and D. K. MAC-  
DONALD & Co.,

*Appellees.*

**Appeal from the District Court for the  
District of Alaska, First Division.**

**BRIEF OF APPELLEES  
BELLINGHAM CANNING CO. AND  
D. K. MacDONALD & CO.**

---

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**FILE**

APR 25 1955

PAUL P. O'BRIEN, CL





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No. 14,699

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vs.

ALASKA INDUSTRIAL BOARD, BELLINGHAM CANNING Co. and D. K. MACDONALD & Co.,

*Appellees.*

Appeal from the District Court for the  
District of Alaska, First Division.

## BRIEF OF APPELLEES BELLINGHAM CANNING CO. AND D. K. MacDONALD & CO.

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### FACTS.

James L. Keehn was employed by the Bellingham Canning Co. as a bull cook on or about August 6, 1952. No definite statement was made by Mr. Keehn as to any accidental injury arising out of and in the course of his employment. In his deposition he stated that he was engaged in placing mattresses on a bed and that one "Tiny" was in the next room and heard

him "holler". See Tr. 27. There was no statement as to what caused him to "holler", although a medical report set forth a history as given by Mr. Keehn to the neurological clinic as follows: "Patient states that he sustained injury to his back in August 1952 while employed as a marine engineer in Alaska. He says that he was bending over to pick up a weight and that he felt a popping sensation in the region of the low back." (Tr. 29.)

Prior to this alleged injury, Mr. Keehn had sustained a serious injury while in a different employment. This injury occurred on November 4, 1951, when his right leg was caught by sliplines aboard a vessel. The diagnosis of his condition after this 1951 injury gave as the first item: "Strain contracture ligaments low back past pelvis to legs as a result of the accident, causes restriction of motion and compression irritation of peripheral nerves passing through these ligaments resulting in peripheral motor and sensory nerve symptoms and signs particularly in right femoral and right sciatic distribution." (Tr. 28.)

Although Mr. Keehn denied any other back disability, on cross-examination he admitted that in 1949 while employed by the Kadak Fisheries a back pain "hit" him while he was lifting a piston and, as a result, he was hospitalized for three days and given electric diathermy treatments. (Tr. 26.)

Despite the questionable nature of the alleged injury while with the Bellingham Canning Co. and

despite the previous injuries to Mr. Keehn's back, he was paid temporary disability compensation by the compensation insurers of the Bellingham Canning Co. in the amount of \$2,264.00. The company also paid all medical expenses, including hospital and doctors' bills, and furnished the employee with two operations consisting of a laminectomy and a fusion of his back, which medical bills were in the amount of \$3,987.00. Upon his release by the attending physician, a compromise of Mr. Keehn's claim was made whereby Mr. Keehn received an additional \$2,880.00, representing 40% permanent partial disability. The compromise and release was approved by the Alaska Industrial Board on June 25, 1953.

At the end of May of 1953, Mr. Keehn undertook employment as chief engineer aboard a vessel, and he was employed later aboard another vessel, which employment terminated September 15, 1953. At that time he underwent another operation on his back which was performed by the Public Health Service in Portland, Oregon. No herniation of the intervertebral disc was found and a new fusion was performed.

Application for Adjustment of Claim was filed with the Alaska Industrial Board on November 3, 1953, contending that Mr. Keehn was entitled to additional temporary disability compensation as a result of the operation. It was not contended that any further award should be made for permanent partial disability. The Alaska Industrial Board, by unanimous

decision, found that: "There was no showing that the aggravation caused by the second injury (the alleged injury of August 1952) exceeds forty per cent permanent partial disability for which compensation was paid under the Compromise and Release dated June 25, 1953 . . ." and denied the application. (Tr. 4.) From this decision applicant appealed to the United States District Court for the District of Alaska, contending in his complaint on appeal that he was entitled to be paid for additional temporary disability as a result of the last operation. The District Court affirmed the decision of the Alaska Industrial Board, holding that there was substantial evidence upon which such decision was based. This appeal has been taken from that decree of the United States District Court for the District of Alaska.

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### **QUESTIONS PRESENTED.**

As indicated by the summary of the evidence involved in this case, Mr. Keehn has had an involved history of injuries to his back. He sustained an injury to his back while lifting a piston in the employ of the Kadak Fisheries in 1949, and had a very serious injury in 1951, the first diagnosis of which involved classic symptoms of low back disability. The history as to any accidental injury arising out of employment with the Bellingham Canning Co. is of an exceedingly doubtful nature. This doubtful claim was settled by a compromise and release and Keehn was paid by the



insurers of Bellingham Canning Co. for temporary disability for the period from the date of his injury in August 1952 to May 31, 1953, in the amount of \$2,264.00. He was also paid all medical expenses, including hospital and doctors' bills, totaling \$3,987.00. The compromise and release provided further for the payment to him of the additional sum of \$2,880.00, representing a 40% permanent partial disability. This compromise and release was approved by the Alaska Industrial Board.

After working approximately five months, Keehn had further back difficulties and sought to recover additional temporary disability payments from the appellees. The Alaska Industrial Board found that there was no showing of any disability attributable to the August 1952 injury in excess of the 40% permanent partial disability for which Mr. Keehn had been paid. Thus the first question presented by this appeal is whether there was any substantial evidence upon which the Alaska Industrial Board could conclude that any alleged change of condition of Mr. Keehn arising after the approval of the compromise and release was not attributable to the August 1952 alleged injury. Obviously, if the alleged change of condition was not attributable to the alleged August 1952 injury, Keehn would have no right to further compensation. In the event that this question should be decided in favor of Mr. Keehn, a second question would be presented as to whether, under the provisions of the Alaska Workmen's Compensation Act,

there is a right to further temporary disability payments after a compromise and release has been approved by the Alaska Industrial Board.

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## ARGUMENT.

### I.

**THERE WAS SUBSTANTIAL EVIDENCE UPON WHICH THE ALASKA INDUSTRIAL BOARD BASED ITS FINDING THAT THERE WAS NO SHOWING OF DISABILITY EXCEEDING 40% CAUSED BY THE ALLEGED INJURY OF AUGUST 20, 1952.**

The Alaska Industrial Board found that the aggravation attributable to the incident of August 1952, the second injury as referred to in the Board's decision, did not exceed the 40% permanent partial disability for which applicant had been paid. This decision in effect states that there was no additional disability attributable to the incident of August 1952 after the compromise and release had been approved by the Alaska Industrial Board.

Section 43-3-22 ACLA 1949 provides in part: "An award by the full Board shall be conclusive and binding as to all questions of fact." The law in regard to appeals from a Board's findings is set forth in Larson's *Workmen's Compensation Law*, Vol. 2, Sec. 80.10, as follows:

"A finding of fact based on no evidence is an error of law. Accordingly, in compensation law, as in all administrative law, an award may be reversed if not supported by any evidence. Conversely, since the compensation board has ex-

pressly been entrusted with the power to find the facts, its fact findings must be affirmed if supported by any evidence, even if the reviewing court thinks the evidence points the other way. This statement is, without any close competition, the number-one cliché of compensation law, and occurs in some form in the first paragraph of compensation opinions almost as a matter of course.”

At Section 80.20 in his work, Larson goes on to state:

“The principal corollary of the ‘substantial-evidence’ rule is the proposition that the reviewing court will not itself weigh the evidence, nor substitute its judgment for that of the commission, even when it is convinced that the weight of the evidence is contrary to the commission’s findings.”

The burden of proof was on the applicant to show that there had been a change in his condition after the compromise and release had been approved, *which change in condition was attributable to the alleged injury of August 1952*. The Alaska Industrial Board, after reviewing all the evidence in this case, found that that burden of proof was not met. The learned judge of the United States District Court for the District of Alaska, after carefully reviewing all of the evidence, found that there was substantial evidence upon which the Board based its decision. Unless this honorable court should find that there was no evidence to justify the Board’s finding, it is respectfully submitted that the decision below should be affirmed.

Appellant sustained a severe crushing injury to his left leg in 1942. In 1951 his right leg was caught by a slipline while he was working aboard a vessel, resulting in the following diagnosis: "Strain contraction ligaments low back past pelvis to legs as a result of the accident, causes restriction of motion and compression irritation of peripheral nerves passing through these ligaments resulting in peripheral motor and sensory nerve symptoms and signs particularly in right femoral and right sciatic distribution." (Tr. 28.) These symptoms as described after the 1951 injury are almost the classical symptoms for nerve root involvements of low back injury. See *Intervertebral Disc Injuries in Workmen's Compensation* by Larry Allen Bear, *Vanderbilt Law Review*, June 1953, page 883 at 885. Appellant had also had another back injury in 1949 while working for Kadak Fisheries.

There was no clear cut history of an accidental injury arising out of and in the course of the employment with Bellingham Canning Co. The testimony of the appellant failed to indicate what caused him to have pain. (See Tr. 27.) Appellant's statement to attending physicians was to the effect that when he bent over he felt a "popping" in his back. (See Tr. 29.) It is to be noted that this statement makes no mention of a lifting or twisting strain but merely alleges that there was a "popping" sensation when appellant bent over.

Despite this exceedingly doubtful history of any accidental injury causing an aggravation of a pre-existing condition, the appellee company very gener-

ously paid Mr. Keehn full temporary disability compensation and took care of medical expenses involved in treating his back, although doubtlessly the cause of the disability antedated the August 1952 incident.

Thereafter, a compromise and release was entered into with Mr. Keehn whereby he was paid for 40% permanent partial disability. It is not contended that his permanent disability has exceeded that amount. The Alaska Act requires that, in cases of partial disability where the disability does not "come wholly within any of the specific cases for which provision is herein made, such employee shall be entitled to receive as compensation a sum which bears the same relation to the amount he or she would be entitled to receive hereunder if he or she were totally and permanently disabled that the loss of earning capacity such employee by reason of the injury, bears to the earning capacity such employee would have had had he or she not been injured . . ." Sec. 43-3-1H ACLA 1949. It is to be noted that the employer is only required to pay for the portion of disability attributable to the injury arising out of and in the course of employment with that company. Under those circumstances and in view of the previous serious injuries and the exceedingly doubtful history of any injury while working for the appellee company, the payment for 40% permanent disability was most generous.

Commencing with May 31, 1953, Mr. Keehn resumed his regular employment aboard various vessels until September 15 when further back difficulty required

an additional operation. It must be admitted that the Alaska Industrial Board would probably have had the right to attribute the last operation to the minor incident of August 20, 1952, disregarding all of the past history of severe injuries sustained by the employee. The Board, however, certainly had ample evidence upon which it could determine that this last operation was unrelated to the minor back strain involved in lifting the mattresses and, accordingly, deny further compensation for that incident. There certainly is as much reason to believe that the back disability was caused either by applicant's work aboard vessels between May 31 and September 15, 1953, during which time he complained that pains occurred while climbing up and down ladders aboard the vessels; or was attributable to the severe injury of November 4, 1951 or to his injury of 1949 while working for the Kadak Fisheries, or a combination of those incidents. Since there are ample facts for the Board to have arrived at that conclusion, the decision of the Alaska Industrial Board denying further compensation should be affirmed.

“That the disability or death for which compensation is claimed resulted from a compensable injury is an essential element of the claimant's case, and the burden rests upon the claimant, therefore, to prove such fact by competent evidence. The burden of showing that a pre-existing infirmity or diseased condition was aggravated by the injury complained of rests upon the claimant . . .” 58 Am.Jur. 859.

By stating that the aggravation caused by the second injury did not exceed 40% permanent partial disability, the Alaska Industrial Board clearly implied that no further temporary disability was attributable to the August 1952 incident. This finding of the Board to the effect that the additional disability was not attributable to the August 1952 incident involves a situation similar to that decided in *John H. Green's Case*, 165 N.E. 120, 266 Mass. 355, wherein the court held:

“The fact that the present condition of the claimant might reasonably result from the injury, or that it was conceivable that this condition might so result, is not sufficient to justify the conclusion that the condition was causally related to the injury. A mere conjecture or surmise is not proof. There must be evidence to support the finding and the burden was upon the employee to prove his case.”

The general requirement as to degree of proof for setting aside an approved compromised settlement based on alleged change of condition is set forth in *Schneider's Workmen's Compensation Text*, Vol. 8, page 638, as follows:

“ “ “While courts have been very generous as to the rules of evidence to establish causation when initial compensation depended on it, yet when that compensation has been paid and a final receipt given, the evidence to overthrow the latter must be of a more definite nature.” It must be such as to make it certain to the trier of the fact that the factual backgrounds for revocation existed.’

“The evidence seeking to overthrow a receipt should be precise and credible; of a more definite and specific nature ‘than that upon which initial compensation is based; the causation between the alleged disability and the accident must be established by more than simply the testimony of the employee and medical testimony based solely upon the employer’s\* own history of the case.’ The purpose of the rule ‘is to prevent the maintenance of false claims and to give some degree of assurance to an employer that his liability has been ended or will not be reestablished unless it is upon evidence which clearly warrants it.’ But ‘where one is under a mistaken belief that he has recovered sufficiently to return to work, such mistaken belief would not of itself warrant setting aside a final receipt.’ ” (\*Should read “employee’s.”)

In the case of *Citizens Coal Mining Co. v. Industrial Commission*, 141 N.E. 434, 309 Ill. 473, an employee complained of pain in his back from pushing a car. At the hearing doctors testified that he suffered from an extension of bones of the back attributable to an old infection which had been going on for many years and that the injury was trivial, contributing in no way to the claimant’s condition. The commission refused to enter an award for the employee and this decision was affirmed on appeal, based upon the fact that the disability was from a long standing condition causing gradual changes in the spine so that the alleged accident was neither an original or aggravating cause of the applicant’s disability.



In *Rosenkranz v. Industrial Commission*, 262 P. 1014, 83 Colo. 123, the claimant was suffering from arthritis of the spine. Although there was evidence which, if believed, would have justified a finding that, in addition to the disease, there was a temporary disability caused by a sprain of the sacroiliac joint, the court held that there was no evidence which would compel such a finding and that the sprain caused by lifting could have been a trivial matter, not enough to cause disability in that the progress of the disease could have culminated when it did without the strain.

Thus, in the case of *Olson v. Department of Labor & Industries*, 26 P. 2d 313, 43 Wash. 2d 85, where an employee was paid temporary disability compensation under an award of the commissioner and later sought additional compensation for an aggravation of his condition, it was held:

“An injured workman seeking compensation for aggravation of injury has the burden of showing aggravation of his condition by medical testimony.”

Evidence was submitted in the *Olson* case showing that Olson's disability was worse than at the time that the award had been entered. It was held, however, that there was no showing that the aggravation was attributable to the injury for which the previous award was granted and, accordingly, the decision denying further compensation was affirmed.

Similarly, in the subject case, the Board was justified in finding that Keehn's last operation was not attributable to the August 20, 1952, incident.

In *Stowsand v. Jack Rabbit Lines*, 58 N.W. 2d 298, (Sup. Ct. S.D. 1953), an employee slipped and stumbled on May 13, 1949, causing a protruded intervertebral disc. The employee had had a previous fall in 1947 but was awarded compensation arising out of the 1949 injury. Subsequently the employee filed for further compensation, alleging "a recurrence of total and complete incapacity from working as a result of the injury." The court held:

"The award of April 15, 1950, allowed compensation for temporary total disability for the period from June 13, 1949, to January 1, 1950, and was res judicata that claimant ceased to suffer a condition of compensable injury. The question here presented is whether claimant by the evidence submitted on review established as a conclusion of law that there was a subsequent disability connected with and attributable to the accidental injury, and not merely that such evidence would sustain a finding to that effect. We have said on other occasions that it is within the province of the Industrial Commissioner to determine the facts, that we do not weigh the evidence and that findings adverse to a claimant cannot be disturbed on appeal unless the record shows that he established the existence of facts by such a clear preponderance of the evidence that it was unreasonable to find to the contrary." (p. 299.)

It was further stated:

"The evidence shows that claimant at the time of the original award was unable to work at her usual employment and was able to do only light

work. The testimony on review was substantially to the same effect but this is not decisive. Incapacity may result from a natural cause such as infirmity, disease, or other cause not attributable to the accident itself. In view of the holding of the Industrial Commissioner at the original hearing that claimant 'ceased to suffer a condition of compensable injury', the decisive question then was whether there was a recurrence of disability occasioned by the accidental injury. Whether the Industrial Commissioner could have found that there was a recurrence of disability we need not determine. We hold that the Industrial Commissioner upon consideration of all the evidence before him could reasonably conclude that there was no change of condition due to the accident and that the finding as to claimant's present disability is not as above indicated a reversal of the former finding of fact that she sustained a compensable injury." (pp. 300-301.)

In *Harris v. Industrial Commission*, 251 P. 2d 890, 75 Ariz. 71, an employee sustained a compression fracture of the fifth thoracic vertebra and a compound fracture of the distal ends of the left tibia and fibia. He was granted an award for temporary disability and permanent partial disability attributable to the partial loss of function of the left leg. Subsequently he had a fusion operation of his back and, for that reason, sought to have the award modified. The court refused to regard the new operation as a justification for reopening the award and upheld the commission's decision on the basis that there was no

change in his condition from the time of the initial award attributable to his injury of January 26, 1948.

In *Simmons v. Marshall*, 94 F. 2d 850, an employee was overcome by the strain of carrying a heavy grid weighing approximately 250 lbs. His employer paid him compensation for an extensive period of time for heart disability in connection with this incident. Subsequently the employee sought to reopen the case, alleging that he was totally disabled, but the commissioner found that the result of carrying this heavy grid was only a wrenching of the back and that the accident was not responsible for the cardiac trouble which admittedly totally disabled the employee. The plaintiff had testified to the performance of heavy work without symptoms of heart trouble prior to this incident. This honorable court upheld the finding of the commissioner, stating:

“The findings of the commissioner are final where there is any evidence warranting inferences supporting them.”

In *Santerli v. Rocky Mountain Fuel Co.*, 158 P. 2d 927, 113 Colo. 1441, an employee received an award for a back injury on the basis of “permanent disability equivalent to 5% as a working unit.” Subsequently the employee sought to file a petition to reopen the award, alleging that he had a loss as a working unit equivalent to 10%. Medical evidence was introduced showing that he did have a 10% permanent partial disability. The court held:

“Until there is competent testimony to show what per cent of the increased disability is due to the

accident, the commission cannot 'ascertain in terms of percentage the extent of general permanent disability which the accident has caused.' . . ."

Accordingly, the Supreme Court of Colorado found that there was no basis for the commissioner's increasing the previous award. Certainly in the subject case where the Board itself has found that there was no increased or additional disability attributable to the injury of August 20, 1952, the decision should be sustained.

In *Erickson v. Globe Wrecking Co.*, 280 N.W. 866, 203 Minn. 261, an employee had wrenched his back while carrying a heavy timber. The court held:

"On the question whether relator's disability was caused by the twisting jerk, there was a strict division of opinion . . ."

and concluded

"The evidence, as is readily seen, lends support to many conclusions while it neither favors nor compels any particular result. In such a case, as has been frequently stated, the ruling of the industrial commission will not be disturbed where it is one of the conclusions at which it may reasonably arrive."

See also *Tudman v. American Ship Building Co.*, 170 F. 2d 842, 7 Cir.

It would appear clear from all the evidence in the subject case that the Alaska Industrial Board was justified in finding that appellant had received full

compensation for any aggravation of his back condition attributable to the August 1952 alleged injury and that the subsequent disability was unrelated to the August 20, 1952 incident.

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## II.

### **A COMPROMISE AND RELEASE APPROVED BY THE ALASKA INDUSTRIAL BOARD MAY NOT BE REOPENED TO PERMIT FURTHER COMPENSATION FOR ADDITIONAL TEMPORARY DISABILITY.**

Aside from express statutory provisions, there is no reason why a compromise settlement of a compensation claim where authorized by the applicable workmen's compensation law should not have the same binding effect as the compromise of any other contractual right. The general rule under these circumstances is set forth in 15 C.J.S. 749 and 750 as follows:

“Since, as heretofore stated supra § 23, the courts favor the compromise and settlement of disputed claims, and it is presumed that the parties making them have consulted their own interest, they are not lightly to be interfered with. Hence, in the absence of fraud, mistake, or other circumstances going to the validity of the agreement, as discussed infra §§ 31-39, a settlement voluntarily entered into cannot be repudiated by either party or set aside by the court; nor will a settlement be opened merely to inquire into the equities between the parties, or because one of the parties has become dissatisfied.”

“A compromise settlement may not be set aside ‘save upon proof of fraud, wilful misrepresentation of true material facts, and for other causes that affect the validity of contracts generally, otherwise legal and binding.’ ” Schneider’s *Workmen’s Compensation Text*, Vol. 8, page 635.

“A settlement of a claim for personal injury will not be annulled because the subsequent recovery of the injured person was not so rapid as he had expected. Newly discovered evidence is not ground for attacking a settlement in the absence of fraud or concealment by the other party thereto.” 15 C.J.S., 751.

In the subject case there is no pleading of fraud or mistake such as could possibly warrant the setting aside of a compromise settlement. The only basis alleged for setting aside the compromise which had been approved by the Board is set forth in the complaint on appeal to the District Court as follows: “Such Decision and Award was erroneous as a matter of law in that the evidence conclusively shows that the plaintiff suffered an operation arising out of and in the course of his employment in September 1953 from which he has not yet recovered for which he is due to be paid temporary disability.”

Quite obviously, in the absence of some particular statutory provision enlarging the common law basis for the setting aside or reopening of compromise settlements, the above quoted statement from appellant’s complaint on appeal to the District Court does not present any valid claim for setting aside the compromise and release.

Nor are the cases cited by learned counsel for appellant of any avail as all of those cases depend on express statutes authorizing the compensation authorities to reopen compromise settlements based on a change in the condition of the employee.

As stated in 165 A.L.R. 9 at 36:

“It would be unwarranted even to hazard a generalization upon the effect of a compromise previously entered into by the parties to bar jurisdiction to review at a later time. The answer to the question rests primarily on local statutes and local policies.

“In some jurisdictions, there are decisions which have resulted in the conclusion that the making of a previous compromise settlement for injuries received in a compensation case does not bar jurisdiction to review the case at a later time, reviewing and reopening it, *where such review is sought upon grounds specified in the local review statute* and within the time limit, if any, specified therein.” (Emphasis ours.)

In the absence of an express statutory provision authorizing the reopening of a claim after approval of a compromise settlement, it is generally held that the settlement is final. See *Dewey v. Union Electric Light & P. Co.*, 83 S.W. 2d 203 (Mo. App., 1935); *Elich v. Industrial Accident Board* (Mont. 1945), 154 P. 2d 793; *Commercial Casualty Ins. Co. v. Hilton*, 87 S.W. 2d 1081, 126 Tex. 497, rehearing denied 89 S.W. 2d 1116, 126 Tex. 505; *Hay v. Woosley*, 135 S.W. 2d 933, 175 Tenn. 475; *Willett v. State Industrial Commission*, 263 P. 664, 129 Okla. 101; *Tippin*



*v. State Industrial Commission*, 272 P. 848, 134 Okla. 179; *Indian Territory Illuminating Oil Co. v. Ray*, 5 P. 2d 383, 153 Okla. 163; *McCarthy's Case*, 115 N.E. 764, 228 Mass. 444; *Kinzer v. Wyandotte County Gas Co.*, 219 P. 278, 114 Kan. 440; *Brown v. Corn Products Ref. Co.*, 55 S.W. 2d 706, 227 M.A. 548; *State ex rel. Wors v. Hostetter*, 124 S.W. 2d 1072, 343 Mo. 945.

The Alaska Act provides for lump sum settlements. Under circumstances where a lump sum is paid in settlement of a claim, states which normally permit reopening of compromises frequently refuse to reopen a settlement. Thus in New Mexico the review statute permitted review by an employer only to reduce or terminate compensation which was being paid and the court intimated that the review statute had no application to lump sum payments. See *Hudson v. Herschbach Drilling Co.*, 128 P. 2d 1044, 46 N.M. 330. See also *Board of Education v. Industrial Commission*, 15 N.E. 2d 288, 368 Ill. 564; *Michelson v. Industrial Commission*, 31 N.E. 2d 940, 375 Ill. 462.

In *Integrity Mut. Casualty Co. v. Nelson*, 183 N.W. 837, 149 Minn. 337, the court refused to permit reopening of a lump sum settlement, stating:

“‘. . . and awards payable periodically for periods exceeding six months, and the lump-sum settlement is there made final, while relief from an award exceeding six months' disability payable periodically is open to readjustment on the grounds therein specified . . . The statute seems quite clear in expression and purpose and will

admit of but one construction, and that to the effect that the law-making body intended the particular settlement to end finally matters so adjusted. The finality feature was no doubt made a part of the statute in encouragement of settlements in the expectation that payment of compensation would promptly reach the injured workman, and the delay usually incident to the litigated controversy be thus avoided. . . . The question requires no further discussion. It was within the power of the legislature to make such settlements final, and the courts are without authority, inherent or otherwise, to nullify the legislative declaration to that effect, except for fraud or deception of a character to entitle the complaining party to relief . . . ’ ”

To the same effect is *Bailey v. U.S.F. & G. Co.*, 155 N.W. 237, 99 Neb. 109, and *Southern Surety Co. v. Parmely*, 236 N.W. 178, 121 Neb. 146.

The appropriate Alaska statutes must be examined in the light of the principles set forth above in order to ascertain whether a compromise and release approved by the Alaska Industrial Board may be set aside in the event that the employee has additional temporary disability after receipt of the lump sum payment. In the absence of statutory authority to that effect, the settlement must be regarded as final.

Section 43-3-6 ACLA 1949 specifies, insofar as applicable here:

“ . . . the employer and the employee or the beneficiary or beneficiaries, as the case may be, shall have the right to reach an agreement in regard

to any claim for injury or death hereunder in accordance with the schedule hereof, but a memorandum of the agreement, in a form prescribed by the Industrial Board, shall be filed with the Board, otherwise the same shall be void for any purpose. If approved by the Board, such agreement shall be enforceable the same as any order or award of the Board, *and subject only to modification in accordance with the provisions of Section 4 hereof.*" (Sec. 43-3-4.) (Emphasis ours.)

The Alaska Industrial Board is authorized to make rules for carrying out the procedure under the Act by virtue of Section 43-3-14 ACLA 1949, and has promulgated Article 17(a) of its Rules of Practice & Procedure in Disputed Claims which states as follows:

"Agreements which provide for the payment of less than the full amount of compensation due or to become due, and which undertake to release the employer from all future liability, will be approved only where it appears that a reasonable doubt exists as to the rights of the parties or that approval would be for the best interest of the parties."

In the subject case, the Alaska Industrial Board approved the compromise and release which provided: "Upon approval of this Compromise agreement by the Alaska Industrial Board and payment in accordance with the provisions thereof, said applicant *releases and forever discharges said employer and insurance carrier from all claims and cause of action*

*in the premises*, subject only to the provisions of Sec. 4 of the Act.” (Emphasis ours.)

Accordingly, unless Section 4 of the Act permits the reopening of a claim for further temporary disability payments after the approval of the compromise and release, it is clear that the payment of the lump sum under the release terminated appellees’ liability.

Section 4 specifies:

“If an injured employee (is) entitled to compensation under any subdivision or part of this schedule, and it shall afterwards develop that he or she is or was entitled to a *higher rate of compensation* under same or some other part or subdivision of this schedule, then and in that event he or she shall receive *such higher rate*, after first deducting the amount that has already been paid him or her. *To that end* the Industrial Board is hereby given and granted continuing jurisdiction of every claim, and said Board may, at any time and upon its own motion or on application, review any agreement, award, decision or order, and on such review, may make an order or award ending, diminishing or increasing the compensation previously awarded, ordered, or agreed to, subject to the maximum or minimum provided in this Act . . .” (Emphasis ours.)

Section 4 applies both to awards and to agreements. It is to be noted that the authorization for the Board’s continuing jurisdiction is limited to the power to provide for a higher rate of compensation if it is determined that the employee is entitled to such higher

rate. The statute makes no mention of providing for additional compensation in the event of a change of condition on the part of the employee after entry of an award or after approval of a compromise and release. It is to be admitted that most statutes providing for continuing jurisdiction of industrial boards specify the right under certain circumstances to reopen claims where there has been a change in the employee's condition. The Alaska Act, however, possibly due to its lump sum requirements in case of permanent disability rather than installment payments as provided in most acts, does not authorize continuing jurisdiction of claims where there has been a change of condition after final award or approved agreement. The continuing jurisdiction provision of the Alaska Act would thus apply to approved compromises in two different situations:

(1) Where an award is made for temporary disability and the rate established for average daily payments is in error. Thus if in a specific case a settlement were entered into on the basis that employee's average daily wages were \$5 and it later could be established that the average daily wages during the period of disability would have been \$10.00, the approved settlement could be modified accordingly.

(2) If the Board determined that an employee had a certain percentage of permanent disability, for example 10%, and it should afterwards develop that he "is or was" disabled to the extent of 20%, the settlement might be reopened and the additional

amount awarded since a higher rate of compensation would be involved.

It is to be noted that, in the subject case, applicant initially sought to increase his rate of temporary disability payments from an average daily wage basis of \$8 to \$10.00. This is the type of situation under which the Board is empowered to exercise continuing jurisdiction. Apparently, however, that point of the appellant was abandoned as no mention was made of it on the appeal to the District Court or in the Statement of Points Relied Upon herein.

The request made by the applicant to reopen the award for additional temporary disability payments could not have been granted by the Board, had it so desired, since it is beyond the Board's authority to reopen a claim after approval of a compromise and release where the question presented did not involve the *rate* of compensation. Appellant is not seeking a *higher rate* of compensation in this proceeding, but is endeavoring to secure additional compensation after his compromise agreement finally settling his claim.

Moreover, it is to be noted that, in the subject case, there was a very substantial question as to whether appellant had sustained any accidental injury arising out of and in the course of his employment with the defendant Bellingham Canning Co., and another substantial question as to whether any or all of the 40% disability was attributable to the minor incident of August 1952. It is certainly to the employer's and

insurance company's credit that they voluntarily made the payment for temporary disability and medical expenses and entered into the agreement to pay the full amount for 40% disability. The appellees thus, in effect, waived the right to contest questions pertaining to whether the employee sustained an accidental injury as required by the Alaska Act and, if so, as to the percentage of disability attributable to such injury. Before seeking to reopen this settlement, the employee should have made tender of the amount received under the compromise and release. Quite obviously the principal incentive for an employer to afford such generous treatment is to avoid the expenses and harassment of future claims arising out of the same incident. The employer should not be exposed to such a renewed claim without first receiving back the amount he paid in order to settle the doubtful liability.

“It is a general rule, subject to the exceptions stated *infra* (2) of this subdivision that where a party to a compromise desires to set aside or avoid the same and to be remitted to his original rights, he must, in the absence of sufficient excuse, place the other party in statu quo by returning or tendering the return of whatever benefit or consideration has been received by him under such compromise, . . .” 15 C.J.S. 763.

This honorable court has ruled on this question in the Alaskan case of *Price v. Connors*, 146 F. 503, wherein it was stated:

“In the present case the jury might have found that the whole of the damage suffered by the

plaintiff did not, in fact, amount to \$500 — the amount the defendants paid the plaintiff in settlement. And since the defendants put in issue all of the allegations of the complaint, it might, if the evidence justified it, have been found by the jury that the plaintiff was not entitled to recover at all. Yet the court below ruled that it was not necessary that the plaintiff should have repaid or tendered the money received by him, as a condition precedent to avoiding the release. That such is not the law upon such a state of facts was distinctly held by this court in the case of *Hill v. Northern Pacific Railway Company*, 113 Fed. 914, 51 C.C.A. 544.

“The judgment is reversed, and cause remanded to the court below for a new trial.”

Following this decision in *Price v. Connors*, the District Court for the Territory of Alaska has held that an employee could not seek additional compensation after receiving payment under a compromise agreement without first tendering back the money received for settlement of the disputed claim. *Beckoff v. Dan Creek Mining Co.*, 6 Alaska 218. Although this case was decided under an earlier Alaskan compensation law, there appears to be no reason why the decision should not be applicable under the present law. Appellant in the subject case seeks to “have his cake and eat it, too.” He succeeded in securing a very favorable settlement for release of a doubtful claim and, after receipt of a large sum of money, wishes to reopen the claim without first restoring the money he received from the appellee.



**CONCLUSION.**

In view of appellant's serious back injury of 1951 and his back injury of 1949, the Alaska Industrial Board had ample basis for its finding that the subsequent alleged aggravation of August 1952 while in the employ of Bellingham Canning Co. did not exceed the amount for which compensation had previously been paid, and there was substantial evidence that any additional disability was not related to that minor incident. No tender was made of the amount paid in settlement of this doubtful claim before appellant brought this proceeding to set aside the compromise and release. Moreover, there have been no grounds stated for setting aside a valid compromise and release approved by the Alaska Industrial Board, since the Alaska continuing jurisdiction statute only provides for cases where an alteration in the rate of compensation is involved. Accordingly, it is respectfully submitted that the decision of the Alaska Industrial Board and the learned judge of the United States District Court should be affirmed.

Dated: Juneau, Alaska,

April 12, 1955.

FAULKNER, BANFIELD & BOOCHEVER,

By R. BOOCHEVER,

*Attorneys for Appellees Bellingham Canning Co. and D. K. MacDonald & Co.*



No. 14700

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United States  
Court of Appeals  
for the Ninth Circuit

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NATIONAL LABOR RELATIONS BOARD,  
Petitioner,  
vs.  
IDAHO EGG PRODUCERS, Appellee.

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Transcript of Record

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Petition for Enforcement of an Order of The National Labor  
Relations Board

FILED

AUG 30 1955

PAUL P. O'BRIEN, CLERK



No. 14700

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United States  
Court of Appeals  
for the Ninth Circuit

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NATIONAL LABOR RELATIONS BOARD,  
Petitioner,

vs.

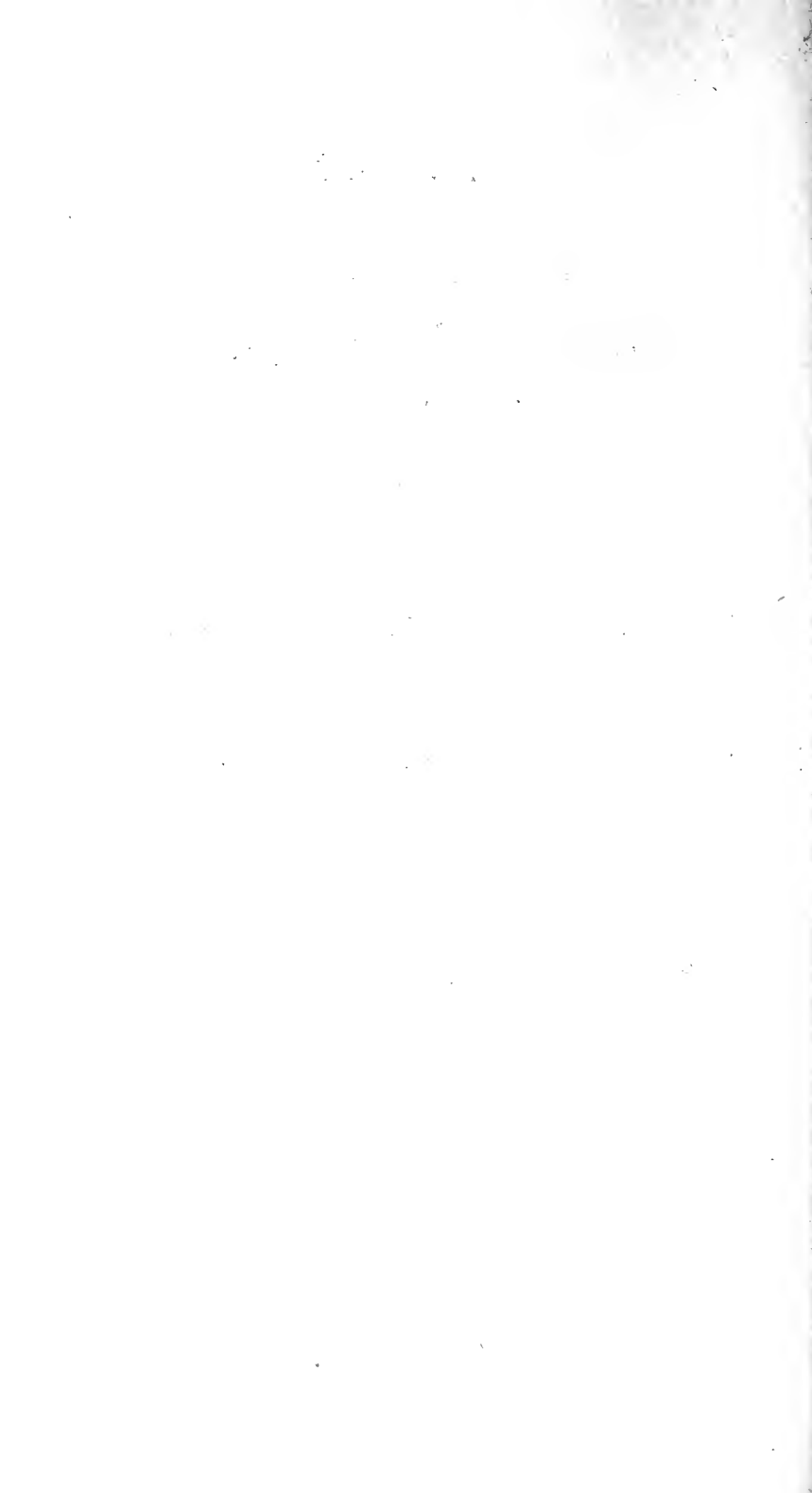
IDAHO EGG PRODUCERS,            Appellee.

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Transcript of Record

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Petition for Enforcement of an Order of The National Labor  
Relations Board



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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GENERAL COUNSEL'S EXHIBIT No. 1-D

United States of America  
Before the National Labor Relations Board  
Nineteenth Region  
Case No. 19-CA-924

IDAHO EGG PRODUCERS

and

TEAMSTERS, CHAUFFEURS, WAREHOUSE-  
MEN AND HELPERS UNION, LOCAL 983,  
AFL

COMPLAINT

It having been charged by Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local 983, AFL, hereinafter called the Union, that Idaho Egg Producers Coop Marketing Association, at Pocatello, Idaho, has engaged in and is now engaging in unfair labor practices affecting commerce as set forth in the Labor-Management Relations Act of 1947, 61 Stat. 136, hereinafter called the Act, the General Counsel of the National Labor Relations Board, on behalf of said Board, by the Regional Director for the Nineteenth Region, acting pursuant to the Board's Rules and Regulations, Series 6, as amended, Section 102.15, hereby issues this Complaint and alleges as follows:

I.

Idaho Egg Producers Coop Marketing Association, hereinafter called Respondent, is and at all times herein alleged was a corporation organized

and existing by virtue of the laws of the State of Idaho, engaged in marketing eggs and poultry and purchasing feed and feed supplies for its members. Respondent has plants in Caldwell, Twin Falls, Boise and Payette, Idaho, including one at Pocatello, Idaho, which is alone involved in this proceeding.

## II.

Respondent, in the course and conduct of its business and at all times herein alleged, continuously has purchased for use at its Pocatello, Idaho, plant raw materials, supplies and equipment valued at about \$800,000 annually, of which about 20 per cent has been shipped directly and 80 per cent indirectly to the plant from suppliers located outside the State of Idaho, and continuously has marketed and shipped from its Pocatello plant products valued at about \$1,000,000 annually, of which 40 per cent is sold and shipped from the Pocatello plant to points without the State of Idaho and 60 per cent is sold and shipped to customers within the State of Idaho who are themselves engaged in commerce within the meaning of the Act.

## III.

Respondent is, and has been at all times material hereto, engaged in commerce within the meaning of the Act.

## IV.

The Union is a labor organization within the meaning of Section 2(5) of the Act.

## V.

All employees including truck drivers employed by Respondent at its Pocatello, Idaho, plant, but excluding all office clerical employees and all guards, professional employees, and supervisors as defined in the Act, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

## VI.

The Union was on or about September 22, 1953, and has been at all times thereafter, and is now, the exclusive bargaining representative of Respondent's employees in the unit described in paragraph V, above, within the meaning of Section 9(a) of the Act.

## VII.

Commencing on or about September 22, 1953, and at all times thereafter, Respondent, by its officers and agents, failed and refused and continues to fail and refuse to bargain collectively in good faith with the Union as the exclusive representative of its employees in the unit described in paragraph V, above.

## VIII.

Respondent, commencing on or about September 22, 1953, and at all times thereafter, by its officers and agents, interfered with, restrained and coerced, and is now interfering with, restraining and coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act by:

(a) Branch Manager C. C. Slayden, on or about

September 24 and 25, 1953, questioning and interrogating its employees in regard to knowledge of the Union and instigation of the Union, and accusing employees of instigating the Union;

(b) Branch Manager C. C. Slayden, on or about September 24, 25, and 26, 1953, threatening employees individually and collectively with loss of existing holidays, Christmas bonus, and other privileges and benefits in the event the Union were successful in coming into the plant;

(c) Branch Manager C. C. Slayden, on or about September 24, 25, and 26, 1953, promising Saturdays off, shorter hours, and more overtime to its employees in the event the Union were unsuccessful in organizing its employees and if the employees were to withdraw their sympathy for, or membership in, and cease their activities on behalf of the Union;

(d) Branch Manager C. C. Slayden, on or about September 26, 1953, offering employees paid time off and free transportation to the Union hall, and actually giving paid time off and free transportation to the Union hall in order to coerce employees to withdraw their application cards from the Union;

(e) Branch Manager C. C. Slayden, commencing with October 4, 1953, and each Saturday thereafter, giving such Saturdays off to the employees in effectuation of his promise to the employees as stated in paragraph (c).

## IX.

By the acts and each of them set forth in para-



graphs VII and VIII, above, Respondent did engage in and is engaging in unfair labor practices within the meaning of Section 8, subsections (a)(1) and (a)(5) of the Act.

### X.

The activities of Respondent as described in paragraphs VII and VIII, above, occurring in connection with the operations of Respondent as described in paragraphs I and II, above, have a close, intimate and substantial relation to trade, traffic and commerce among the several states of the United States, and have led to and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

### XI.

The aforementioned acts and conduct of Respondent constitute unfair labor practices affecting commerce within the meaning of Section 8, subsections (a)(1) and (a)(5), and Section 2, subsections (6) and (7) of the Act.

Wherefore, the General Counsel of the National Labor Relations Board, on behalf of the Board, on this 12th day of January, 1954, issues this Complaint against Idaho Egg Producers Coop Marketing Association, Pocatello, Idaho, the Respondent herein.

/s/ THOMAS P. GRAHAM, JR.,

Regional Director National Labor Relations Board,  
Region 19

[Title of Board and Cause.]

GENERAL COUNSEL'S EXHIBIT No. 2

ANSWER TO COMPLAINT

Comes now the Respondent, Idaho Egg Producers Coop Marketing Association, and for its Answer to Complaint specifically denies each and every allegation in the Complaint except as hereinafter admitted, qualified or explained.

I.

Respondent admits Paragraphs I and II of the Complaint. Respondent has no knowledge with reference to Paragraph IV of the Complaint and therefore neither admits nor denies the same. Respondent admits Paragraph V of the Complaint. Respondent denies Paragraph III.

II.

Respondent denies Paragraph VI of the Complaint and denies that the Union has ever been or is at the present time the bargaining representative of its employees and Respondent alleges that at no time have the employees had an opportunity to make a free choice or selection of their bargaining agent by means of an election as provided by the Act.

Respondent, by way of affirmative defense, alleges that any authorization cards or application blanks for membership in the union obtained from

Respondent's employees were through coercive, threatening and other unlawful means on the part of the union and that said cards or application blanks obtained in this manner are therefore invalid and void and are of no force or effect whatsoever.

#### IV.

Respondent denies Paragraph VII of the Complaint and in connection therewith alleges that the Respondent has at all times held itself ready to bargain with the duly constituted and selected bargaining representative of its employees providing the same has been selected through an election as provided by law.

#### V.

Respondent denies Paragraph VIII of the Complaint and specifically denies that it has in any way interfered with, restrained or coerced its employees as provided by Section 7 of the Act and denies Sub-paragraphs (a), (b), (c), (d) and (e) of said Paragraph VIII and Respondent states that with reference to conferences by its Branch Manager C. C. Slayden with its employees, said conferences were merely statements of company policy and expressions of opinions and were not threatening, coercive nor made in the form of promises as prohibited by the Act.

Respondent therefore denies Paragraph IX of the Complaint.

#### VI.

Respondent denies Paragraphs X and XI of the Complaint.

Wherefore, Respondent asks that the Complaint in the above entitled action be dismissed.

IDAHO EGG PRODUCERS COOP  
MARKETING ASSOCIATION

/s/ By E. A. WESTON,  
Attorney for Respondent

Duly Verified.

Affidavit of Service by Mail attached.

GENERAL COUNSEL'S EXHIBIT No. 3

Mr. C. C. Slayden                      September 23, 1953  
Idaho Egg Producers, Pocatello, Idaho

Dear Sir:

A majority of your employees has signed authorization slips designating Teamsters Local No. 983 as their bargaining agent regarding wages and conditions of employment. Therefore, we request a meeting with you in the next five days.

Please notify this office to a time that is convenient for you to meet. Return receipt requested.

Yours truly,

/s/ Clarence Lott

Teamsters Local Union No. 983  
Clarence Lott, Sec'y-Treas.

CL:h1b

True Copy

GENERAL COUNSEL'S EXHIBIT No. 4

United States of America  
National Labor Relations Board

PETITION

\* \* \* \* \*

Case No. 19-RC-1391. Date filed: 9-24-53. Compliance Status Checked by: 1-1-54 nm.

The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority:

1. Purpose of this Petition:

A. [ x ] RC—Certification of Representatives.—A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner, and Petitioner desires to be certified as representative of the employees for purposes of collective bargaining, pursuant to Section 9 (a) and (c) of the act.

\* \* \* \* \*

2. Name of Employer: Idaho Egg Producers Co-op Marketing Assn.

3. Address of Establishment: 1009 South Second, Pocatello, Idaho.

\* \* \* \* \*

5. Description of Unit Involved:

Included: All employees working at the company's place of business Pocatello, Idaho, including truck drivers.

Excluded: Office clerical and supervisors as defined by the act.

6a. Number of Employees in Unit: Twenty-six.

6b. Number of Employees Supporting this Petition: Nine.

7a. Request for recognition as Bargaining Representative was made on: See enclosed copy of letter.

8. Recognized or Certified Bargaining Agent: None.

9. Date of Expiration of Current Contract, if any: No contract.

\* \* \* \* \*

11. Parties or Organizations which have claimed recognition as Representatives: None.

12. Other Unions interested in the employees described in Item 5 above: None.

13. Declaration: I declare that I have read the above petition and that the statements therein are true to the best of my knowledge and belief.

Petitioner: Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 983.

Affiliation, if any: International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers (AF of L).

/s/ By CLARENCE LOTT,  
Sec. & Treas.

Address: Box 1085, Pocatello, Idaho; Telephone number: 4349.

[Letterhead of Idaho Egg Producers]

Dear Sir:

We hereby acknowledge your letter of September 23, 1953, pertaining to the organization of our employees of the Pocatello branch of the Idaho Egg Producers.

Matters of this kind are not within the jurisdiction of this office. We are therefor forwarding your communication to the General Office at Caldwell, Idaho for consideration of the management and Board of Directors of this Farm Cooperative Association.

Very truly yours,

Idaho Egg Producers  
/s/ By C. C. Slayden, Branch Mgr.

## GENERAL COUNSEL'S EXHIBIT No. 6

United States of America  
National Labor Relations Board

## AGREEMENT FOR CONSENT ELECTION

Pursuant to a Petition duly filed under Section 9 of the National Labor Relations Act as amended, and subject to the approval of the Regional Director for the National Labor Relations Board (herein

called the Regional Director), the undersigned parties hereby waive a hearing and Agree As Follows:

1. Election.—An election by secret ballot shall be held under the supervision of the said Regional Director, among the employees of the undersigned Employer in the unit defined below, at the indicated time and place, to determine whether or not such employees desire to be represented for the purpose of collective bargaining by (one of) the undersigned labor organization(s). Said election shall be held in accordance with the National Labor Relations Act, the Board's Rules and Regulations, and the customary procedures and policies of the Board, provided that the determination of the Regional Director shall be final and binding upon any question, including questions as to the eligibility of voters, raised by any party hereto relating in any manner to the election, and provided further that rulings or determinations by the Regional Director in respect of any amendment of any certification resulting therefrom shall also be final.

2. Eligible Voters.—The eligible voters shall be those employers included within the Unit described below, who were employed during the payroll period indicated below, including employees who did not work during said payroll period because they were ill or on vacation or temporarily laid off, and employees in the military services of the United States who appear in person at the polls, but excluding any employees who have since quit or been



discharged for cause and have not been rehired or reinstated prior to the date of the election and any employees on strike who are not entitled to reinstatement. At a date fixed by the Regional Director, the Employer will furnish to the Regional Director an accurate list of all the eligible voters, together with a list of the employees, if any, specifically excluded from eligibility.

3. Notices of Election.—The Regional Director shall prepare a Notice of Election and supply copies to the parties describing the manner and conduct of the election to be held and incorporating therein a sample ballot. The Employer, upon the request of and at a time designated by the Regional Director, will post such Notice of Election at conspicuous and usual posting places easily accessible to the eligible voters.

4. Observers.—Each party hereto will be allowed to station an equal number of authorized observers, selected from among the nonsupervisory employees of the Employer, at the polling places during the election to assist in its conduct, to challenge the eligibility of voters, and to verify the tally.

5. Tally of Ballots.—As soon after the election as feasible, the votes shall be counted and tabulated by the Regional Director, or his agent or agents. Upon the conclusion of the counting, the Regional Director shall furnish a Tally of Ballots to each of the parties. When appropriate, the Regional Director shall issue to the parties a certification of

representatives or certificate of results of election, as may be indicated.

6. **Objections, Challenges, Reports Thereon.**—Objections to the conduct of the election or conduct affecting the results of the election, or to a determination of representatives based on the results thereof, may be filed with the Regional Director within five days after issuance of the Tally of Ballots. Copies of such objections must be served upon the other parties at the time of filing with the Regional Director. The Regional Director shall investigate the matters contained in the objections and issue a report thereon. If objections are sustained, the Regional Director may in his report include an order voiding the results of the election and, in that event, shall be empowered to conduct a new election under the terms and provisions of this agreement at a date, time, and place to be determined by him. If the challenges are determinative of the results of the election, the Regional Director shall investigate the challenges and issue a report thereon. The method of investigation of objections and challenges, including the question whether a hearing should be held in connection therewith, shall be determined by the Regional Director, whose decision shall be final and binding.

7. **Run-Off Procedure.**—In the event more than one labor organization is signatory to this agreement, and in the event that no choice on the ballot in the election receives a majority of the valid ballots cast, the Regional Director shall proceed in ac-

cordance with the Board's Rules and Regulations.

8. Commerce.—The Employer is engaged in commerce within the meaning of Section 2 (6) (7) of the National Labor Relations Act.

9. Wording on the Ballot.—Where only one labor organization is signatory to this agreement, the name of the organization shall appear on the ballot and the choice shall be "Yes" or "No." In the event more than one labor organization is signatory to this agreement, the choices on the ballot will appear in the wording indicated below and in the order enumerated below, reading from left to right on the ballot:

First.

Second.

Third.

Fourth.

10. Payroll Period for Eligibility—Period ending immediately preceding election.

11. Date, Hours, and Place of Election: To be determined by Regional Director.

12. The Appropriate Collective Bargaining Unit: All employees working at the Company's place of business in Pocatello, Idaho, including truck drivers, but excluding office clerical and supervisors as defined in the Act.

If Notice of Representation Hearing has been issued in this case, the approval of this agreement by the Regional Director shall constitute with-

drawal of the Notice of Representation Hearing heretofore issued.

Idaho Egg Producers Co-op Marketing  
Association, Pocatello Branch (only)  
(Employer)

/s/ By EARL H. BROCKMAN,  
General Manager

Teamsters, Chauffeurs, Warehousemen  
and Helpers Local Union 983, AFL  
(Petitioner)

/s/ By CLARENCE LOTT

Date executed: October 1, 1953.

Recommended:

/s/ HOWARD E. HILBUN,  
Field Examiner National Labor  
Relations Board

Date approved: 10/5/53.

/s/ THOMAS P. GRAHAM, Jr.  
Regional Director, National Labor  
Relations Board

Case No. 19-RC-1391.

---

GENERAL COUNSEL'S EXHIBITS No. 7-a,  
7-b, 7-c, 7-d, 7-e, 7-f, and 7-g

General Counsel's Exhibit No. 7-a

The undersigned hereby designates International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, Local No. 983 as his bargaining agency for the purpose of collective bargaining

regarding wages, union shops, and conditions of employment under the laws of the United States of America and/or the State Laws and law amendatory thereto.

Effective this date Sept. 21, 1953, and/or until Sept. 21, 1954.

Signed: Thora Panter.

Witness: Marvin E. Herzinger.

[Printer's Note: Paragraph one is the same in the following exhibits as set out above in Exhibit 7-a.]

General Counsel's Exhibit No. 7-b

Effective date Sept. 21, 1953, and/or until Sept. 21, 1954.

Signed: Ida Mae Brooks.

Witness: Erma Herzinger.

General Counsel's Exhibit 7-c

Effective this date 9/21/53, and/or until 9-21, 1954.

Signed: Carrie Tofanelli.

Witness: Marvin E. Herzinger.

General Counsel's Exhibit 7-d

Effective this date 9-21, 1953, and/or until 9-21, 1954.

Signed: William S. Hoffman.

Witness: Marvin E. Herzinger.

General Counsel's Exhibit 7-e

Effective this date 9-21, 1953, and/or until 9-21, 1954.

Signed: Elizabeth Pharris.

Witness: Marvin E. Herzinger.

General Counsel's Exhibit 7-f

Effective this date Sept. 22, 1953, and/or until Sept. 22, 1954.

Signed: Mrs. Evelyn Pharris.

Witness: Erma Herzinger.

General Counsel's Exhibit 7-g

Effective this date Sept. 22, 1953, and/or until Sept. 22, 1954.

Signed: Lena Panter.

Witness: Erma Herzinger.

---

GENERAL COUNSEL'S EXHIBITS No. 8-a,  
8-b, 8-c, 8-d, 8-f, 8-g, 8-h, 8-i

General Counsel's Exhibit No. 8-a

The undersigned hereby designates International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, Local No. 983 as his bargaining agency for the purpose of collective bargaining regarding wages, union shops, and conditions of employment under the laws of the United States of America and/or the State Laws and law amendatory thereto.

Effective this date 9-21, 1953, and/or until 9-21, 1954.

Signed: Donna Christenson.

Witness: Erma Herzinger.

[Printer's Note: Paragraph one in the following is the same as Exhibit 8-a, above.]

General Counsel's Exhibit 8-b

Effective this date 9-22, 1953, and/or until 9-22, 1954.

Signed: Gene Ellsworth.

Witness: Erma Herzinger.

General Counsel's Exhibit 8-c

Effective this date 9-22, 1953, and/or until 9-22, 1954.

Signed: Frances F. Sladek.

Witness: Erma Herzinger.

General Counsel's Exhibit 8-d

Effective this date Sept. 22, 1953, and/or until Sept. 22, 1954.

Signed: Velma Armstrong.

Witness: Erma Herzinger.

General Counsel's Exhibit 8-f

Effective this date 9-22, 1953, and/or until 9-22, 1954.

Signed: Janet Stoddard.

Witness: Erma Herzinger.

General Counsel's Exhibit 8-g

Effective this date 9-21, 1953, and/or until 9-21, 1954.

Signed: Ruthe Jensen.

Witness: Erma Herzinger.

General Counsel's Exhibit 8-h

Effective this date Sept. 21, 1953, and/or until Sept. 21, 1954.

Signed: Bernard Godfrey.

Witness: Marvin E. Herzinger.

## General Counsel's Exhibit 8-i

Effective this date Sept. 21, 1953, and/or until  
Sept. 21, 1954.

Signed: Russell Going.

Witness: Marvin E. Herzinger.



Name	Sex	Position	Rating
<del>Harold Tall</del>	Male	Feed & Egg Dept. Working Foreman	Foreman
Shirley Montague	Male	Truck Driver	Common Labor #1
Edmund Cordon	Male	Truck Driver	Common Labor #1
Frank McNabb	Male	Feed Mixer	Common Labor #1
Hans Knudsen	Male	Egg Dept. - Floor	Common Labor #1
Melvin Ames	Male	Salesman & Truck Driver	Common Labor #1
Gene Ellsworth	Male	Truck Driver	Common Labor #2
Bernard Godfrey	Male	Feed Dept. - Helper	Common Labor #2
<del>Donald Lee</del>	Male	Egg Dept. - Helper	Common Labor #2
William Hoffman	Male	Feed & Egg Dept. - Helper	Common Labor #3
George Wakley	Male	Janitor	Common Labor #3
Russell Going	Male	Feed Dept. Helper	Common Labor #3
<del>Franklin Baker</del>	Male	Egg Salesman - (Commission)	
Azella Taylor	Female	Egg Candler	Common Labor #1
Barrie Monroe	Female	Egg Candler	Common Labor #1
Vina Jensen	Female	Egg Candler	Common Labor #1
Thora Panter	Female	Egg Candler	Common Labor #1
Frances Sladek	Female	Egg Candler	Common Labor #1
Ruth Jensen	Female	Egg Candler	Common Labor #1
Carrie Tofanelli	Female	Egg Candler	Common Labor #1
Velma Armstrong	Female	Egg Candler	Common Labor #2
Ora Panter	Female	Box Maker & Egg Cartoner	Common Labor #2
Erma Herzinger	Female	Egg Candler	Common Labor #2
<del>Barbara Boody</del>	Female	Egg Cartoner	Common Labor #3
<del>Barbara Boody</del>	Female	Egg Dept. Helper & Candler	Common Labor #3
Vina Cordell	Female	Egg Candler	Common Labor #3
Twelyn Pharris	Female	Egg Candler	Common Labor #3
Elizabeth Pharris	Female	Egg Candler	Common Labor #3
Janet Stoddard	Female	Egg Candler	Common Labor #3
Ada Brooks	Female	Egg Candler	Common Labor #3
Donna Christensen	Female	Egg Candler	
Lydia Conley	"	"	

# NATIONAL LABOR RELATIONS BOARD

Docket No. 15-14-124

Identified

Disposition

Received

Reported

In the matter of

Date

Witness

Reporter

No. Pages



[Title of Board and Cause.]

## INTERMEDIATE REPORT AND RECOMMENDED ORDER

Alan A. Bruckner, for the General Counsel; Clarence Lott, of Pocatello, Idaho, for the Union; Eli Weston and J. L. Eberle, of Boise, Idaho, for Respondent.

Before: Martin S. Bennett, Trial Examiner.

### Statement of the Case

This proceeding is brought under Section 10 (b) of the National Labor Relations Act, 61 Stat. 136, herein called the Act, and is based upon a charge filed by Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local 983, AFL, herein called the Union, against Idaho Egg Producers, herein called Respondent.<sup>1</sup> The General Counsel of the National Labor Relations Board thereafter issued a complaint dated January 12, 1954, against Respondent, alleging that it had engaged in unfair labor practices within the meaning of Section 8 (a) (1) and (5) of the Act. Copies of the charge, complaint and notice of hearing thereon were duly served upon Respondent.

In substance, the complaint alleged that Respondent on and after September 22, 1953, had failed and refused to bargain in good faith with the Union as the exclusive representative of its employees in

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<sup>1</sup> The pleadings were amended at the hearing to reflect the correct name of Respondent.

an appropriate unit and that Respondent had unlawfully questioned and interrogated its employees concerning their union activities; had threatened employees with loss of holidays and loss of a Christmas bonus if the Union organized the plant; had promised employees Saturdays off, shorter hours, and additional overtime if the employees abandoned their union activities; had offered and given employees paid time off and free transportation to the union hall for the purpose of withdrawing their union application cards; and, pursuant to its promise, did give its employees Saturdays off in return for their withdrawal from the Union.

In its duly filed answer, Respondent denied the commission of any unfair labor practices and denied that the Union was or is the majority representative of the employees. It alleged that the employees had not selected a bargaining representative by means of a Board election; that the authorization cards obtained by the Union were procured through coercive and unlawful means; that said cards were therefore void and of no effect; and that any statements to employees by management were merely statements of company policy and protected expressions of opinion.

Pursuant to notice, a hearing was held at Pocatello, Idaho, on January 25 and 26, 1954, before the undersigned Trial Examiner, Martin S. Bennett, duly designated by the Associate Chief Trial Examiner. The parties were represented by counsel who participated in the hearing and were afforded full opportunity to be heard, to examine and cross-

examine witnesses, and to introduce relevant evidence. At the close of the hearing, the parties were given an opportunity to argue orally and to file briefs. Oral argument was waived and a brief has been received from Respondent.

Upon the entire record in the case, and from my observation of the witnesses, I make the following:

### Findings of Fact

#### I. The Business of Respondent

Idaho Egg Producers is an Idaho corporation which is engaged in the purchase of feed and feed supplies and in the marketing of eggs and poultry for its members. It maintains five plants in the State of Idaho, including a plant at Pocatello which is the only plant directly involved in this proceeding. Respondent annually purchases for its Pocatello plant raw materials, supplies and equipment valued at approximately \$800,000, of which about 20 percent is shipped to the plant directly, and the remainder indirectly, from suppliers located outside the State of Idaho. It annually markets and ships from its Pocatello plant products valued at approximately \$1,000,000, of which 40 percent is shipped to points outside the State of Idaho; the remainder is shipped to customers within the State of Idaho who are engaged in commerce within the meaning of the Act. I find that Respondent is engaged in commerce within the meaning of the Act.

#### II. The Labor Organization Involved

Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local 983, AFL, is a labor organization

which admits the employees of Respondent to membership.

### III. The Unfair Labor Practices

#### A. The Organizational campaign.

The issues herein are whether, following immediately upon the initial organization of Respondent's Pocatello plant by the Union, Respondent unlawfully interfered with, restrained, and coerced its employees, and refused to bargain with the Union.

Insofar as the record indicates, Respondent's Pocatello plant has never been organized by a labor organization. An organizational campaign was commenced by the Union some time prior to September of 1953, and this culminated in a meeting of employees conducted by Secretary and Treasurer Clarence Lott of the Union on Tuesday evening, September 22, 1953. The meeting was attended by 18 or 19 of the approximately 27 employees in the bargaining unit, as well as by Lott, Business Agent Dewey Doss, and two nonemployees who were union supporters, namely, Marvin Herzinger, husband of Employee Erma Herzinger, who is a steward for the Union at another plant, and by the husband of another employee. A number of union cards were signed during this meeting as well as on the previous day.

Lott explained to the employees assembled at the meeting on September 22 that a majority had signed authorization cards and that if Respondent would acknowledge this fact negotiations could commence at once. He stated that if Respondent did not acknowledge this, a petition for an election

would be filed with the Board and bargaining negotiations would be delayed until the Union was certified. After the view was expressed by the employees that Respondent would not grant immediate recognition to the Union, Lott announced that the Union on the following morning would file a petition for an election and would also request Respondent to bargain. Some concern was expressed by the employees at the meeting lest the names of authorization card signers be divulged to management. Lott assured them that the Union would not reveal any of their names to Respondent, and that, in any event it would be necessary for the cards to accompany the representation petition to the Regional Office of the Board in order to demonstrate support of the Union by employees.<sup>2</sup> On September 23 the Union wrote to Respondent as follows:

Mr. C. C. Slayden

Idaho Egg Producers, Pocatello, Idaho

Dear Sir:

A majority of your employees has signed authorization slips designating Teamsters Local No. 983 as their bargaining agent regarding wages and conditions of employment. Therefore, we request a meeting with you in the next five days.

Please notify this office to (sic) a time that is convenient for you to meet. Return receipt requested.

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<sup>2</sup> Presumably having in mind the requirements of Section 101.17 of the Board's **Statements of Procedure**.

This letter was received on September 24 by Cecil Slayden, who is branch manager of the plant and the chief representative of Respondent at the plant. In fact, insofar as the record indicates, there is but one other supervisory employee in the plant, Foreman C. F. Talbot, who is subordinate to Slayden.

On September 24, the Union filed a representation petition with the Board in Case No. 19-RC-1391, seeking an election among all employees of the Pocatello plant, excluding office clericals and supervisors. On September 26, Slayden replied as follows to the Union's request of September 23 for a meeting. This letter was prepared on Respondent's letterhead which indicates that Respondent has five branches and that this particular letter emanated from Respondent's branch office at Pocatello.

We hereby acknowledge your letter of September 23, 1953, pertaining to the organization of our employees of the Pocatello branch of the Idaho Egg Producers.

Matters of this kind are not within the jurisdiction of this office. We are therefor forwarding your communication to the General Office at Caldwell, Idaho for consideration of the management and Board of Directors of this Farm Cooperative Association.

Very truly yours,

Idaho Egg Producers

/s/ By C. C. Slayden, Branch Mgr.



As will appear, certain conduct attacked herein by the General Counsel was engaged in by Slayden on and before September 26. On Monday, September 28, Lott and Doss visited the plant and introduced themselves to Slayden in their representative capacities. They informed him that a majority of the employees had signed authorization cards; that it was the duty of the Union to represent these employees; and that the Union had received Slayden's letter referring them to the Caldwell office. It may be noted that Caldwell is located approximately 200 miles from Pocatello.

Lott asked Slayden whether the Caldwell office would contact the Union directly or whether information from that office would be relayed to Slayden, the branch manager at Pocatello, and thence to the Union. Slayden replied that he had not been advised concerning the policy of the Caldwell office in the matter and specifically whether it would deal with the Union or on the other hand request an election. After a discussion of statements made by Slayden to employees on the previous Saturday, September 26, the meeting ended. Lott was not thereafter contacted by the Caldwell office of Respondent and it does not appear that he ever contacted that office.

On October 1, the Union and Respondent entered into an agreement for a consent election; the signer for Respondent was its general manager, one Brockman, whose office is apparently located at a location other than the Pocatello office. The representation petition was withdrawn by the Union

on October 29, and this was approved by the Regional Director for the Nineteenth Region on November 2, 1953.

B. Interference, restraint, and coercion.

The majority of Respondent's employees are women who work inside the plant, primarily at egg candling, whereas the male employees perform outdoor operations such as loading and delivery. The leaders in the organizational campaign of the Union were female employees Ruthe Jensen, Donna Christenson, and Erma Herzinger, aided by Marvin Herzinger, husband of Erma, who was a steward in the Union and employed by another concern in the area. These three employees, at times accompanied by Marvin Herzinger, visited and spoke to employees in connection with signing cards on September 21 and 22, 1953.

The record discloses that Branch Manager Slayden, who on September 24 received the Union's demand for recognition, actually learned of the September 22 meeting, the only one held by the Union, on September 23 from at least two employees, namely Ora Panter and William Hoffman, both card signers; in fact as will appear below, Slayden soon thereafter claimed to be aware of the identities of the union adherents. Slayden then proceeded to take the following moves in the period between his receipt of the union request for recognition and his reply dated September 26 wherein he informed the Union that its request for a meeting was not within his "jurisdiction" and that he

was forwarding its letter to Caldwell for consideration by Respondent's Board of Directors.

Although Slayden in his letter of September 26 to the Union stated that matters involving collective bargaining were matters for consideration by the general office of Respondent at Caldwell, his conduct on and before that date demonstrates that he did consider it within his jurisdiction to take steps to counteract the union organizational campaign which had succeeded in signing up a majority of employees by September 22.

Slayden took the initiative in the matter by summoning Ruthe Jensen, a leader in the union organizational campaign, to his office on the morning of September 24.<sup>3</sup> Slayden initially asked why she had done what she did, to which Jensen did not reply. Slayden then stated that he knew the names of all employees who had signed cards; that this information had been brought to his attention by Employee William Hoffman on the previous day; and that he, Slayden, had learned from various sources that Jensen was "one of the main ones."

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<sup>3</sup> Jensen placed the incident on this date; Slayden claimed that it took place on September 25, but was not entirely certain of the date. This incident took place the day after Employee Hoffman divulged the details of the September 22 meeting to Slayden on September 23. Slayden's testimony also discloses that September 24 was probably the date, in view of the sequence of events concerning the Hoffman incident; I therefore have accepted Jensen's testimony herein. In any event, it is immaterial to this issue whether the incident took place on September 24 or 25.

Jensen replied that she would not lie to Slayden and that it was true that she was one of the leaders in the movement. Slayden asked why she had not come to him directly with the problem. She replied that she had at an earlier date approached him for a wage increase but that "we couldn't get it." Slayden stated that if the Union organized the plant there was "nothing in the Union deal" that assured the employees of receiving their bonus; this referred to the annual bonus paid at Christmas to each employee and consisting of \$2 per month, apparently for the calendar year.

Slayden went on to state that he had plans in the safe for the installation of machinery that would substantially reduce the number of personnel required to operate the plant. It may be noted that these plans for the installation of labor saving machinery had been in Respondent's possession for two years and their existence was known to the employees. However, Slayden admitted at the hearing that he had not arrived at any decision to install the machinery.

During the talk Slayden asked Jensen what it was that the employees wanted. Jensen replied that they were interested in receiving higher wages and getting Saturdays off.<sup>4</sup> Slayden stated that he could not give the employees more money but that he would try to get them Saturdays off. At the end of

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<sup>4</sup> The female employees then worked 6 days a week; their hours were from 7 a.m. to 4 p.m. Monday through Friday, and from 7 a.m. to noon on Saturday.

the interview, Slayden called in Employee Hoffman to verify to Jensen the fact that he, Hoffman, had in fact divulged the names of union adherents to Slayden. Hoffman admitted that he had done so and commenced to cry, whereupon Jensen left.

The foregoing findings as to the conversation on September 24 are based upon the credited testimony of Jensen. Here as elsewhere in the case a determination of what actually took place between Slayden and his employees is a difficult one. Slayden's testimony in many respects was in agreement with that of Jensen, but in others was not. He admitted summoning Jensen to the office; that he asked her why she had started his union troubles; that he questioned her concerning the demands of the employees; and that she stated the employees wished more money and Saturdays off. He admitted that he brought up the possibility of the installation of machinery if wage demands were too high. Moreover, he admitted at one point that he told Jensen the employees "could bargain with him."

At the hearing Respondent stressed the fact, as Slayden further testified, that he informed Jensen that the question of payment of a Christmas bonus depended upon "the union contract." And it is true that Jensen, on cross-examination and in response to a leading question, as well as thereafter on re-direct, also testified that the payment of higher wages and the bonus as well as getting Saturdays off depended, according to Slayden, upon the union contract as finally written. Paradoxically, however,

Slayden at one point testified that no mention was made of a contract.

Although I consider the resolution a close one, the foregoing findings have been made based primarily upon Jensen's testimony on direct examination which is supported by Slayden's admissions. In so finding, I am impressed by the fact, as will appear below in more detail, that Slayden took the initiative about one week later in unilaterally giving the employees Saturdays off, an action which I deem inconsistent with his claim that he had stressed that the receipt of benefits depended upon the union contract, a contention which if true might lead me to view this episode differently. Also accorded weight herein is the fact that Slayden admittedly introduced the threat of economic loss to the girls by technological change and he did not peg the introduction of this new equipment to the provisions of the union contract. Finally, also accorded weight herein, is the fact that Slayden admittedly invited the employees through Jensen to bargain with him directly.

After leaving Slayden's office, Jensen returned to her duties as an egg candler, the category in which almost all the female employees were employed, and, as she testified, reported to the female employees what Slayden had said, save for his statement that he knew the names of all who had signed union cards. Thereafter, and for the next few days, there was considerable discussion among the employees concerning Slayden's remarks to Jensen.

Employee Donna Christenson, who worked alone

in the egg cartoning room in the basement and who was one of the leaders in the union movement, was also approached by Slayden on September 24. According to Christenson, Slayden spoke to her that afternoon, while she was at work, and asked her what she knew about the Union; Christenson disclaimed any knowledge beyond that possessed by the other employees. Slayden proceeded to state that he knew who had started the Union, as was the fact, and that he had been advised that Christenson was one of the leaders in the movement, which was also the fact. Although stating that it made no difference to him whether or not she joined the Union, he added that if the Union "went in" the employees would not be "getting off" 5 or 10 minutes before the lunch and closing hours, respectively, as had been the practice, and that they also would not receive a Christmas bonus.<sup>5</sup>

Sometime between September 24 and 26 and probably on the morning of September 24, Foreman Talbot, admittedly a supervisory employee, ap-

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<sup>5</sup> These findings are based upon the forthright testimony of Christenson, who impressed me as an honest witness. Slayden was not questioned concerning this incident, but generally denied threatening employees with the loss of any existing privileges or benefits. Slayden also approached Christenson on September 25, as she uncontrovertedly testified, and asked if she had heard a rumor to the effect that if the Union "didn't go in" the employees would be discharged. I deem this testimony inconclusive, and, in the absence of further explanation of the statement, I have based no adverse finding on the September 25 incident.

proached Christenson; stated that Respondent had received a letter from the Union, apparently the letter received on the morning of September 24; and asked what Christenson knew about the Union. He also stated that Slayden had been given the names of the union adherents among the employees by Employee Bill Hoffman; it may be noted that Hoffman and Christenson, as well as several others, had been in the group that originally contacted the union representatives, and Hoffman had also been present at the meeting held on September 22. Talbot went on to state that if the Union "did come in it was going to be a lot harder for everyone because \* \* \* there wasn't going to be any shirking at all, that there would be someone to make sure that the work was done and that we weren't loafing." <sup>6</sup>

The next activity of significance took place at the plant on Saturday morning, September 26; the regular working hours for Saturdays were then from 7 a.m. to noon. Here too, there is considerable testimony of a highly conflicting nature in the record and I have given considerable thought to a determination of what actually took place on this morning. My findings are set forth below and the reasons therefor will follow.

It is clear that Plant Manager Slayden did address the employees on this Saturday morning and probably on two different occasions, although some

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<sup>6</sup> This finding is based upon the uncontroverted testimony of Christenson; Talbot was not questioned concerning the incident.



witnesses were unable to recall more than one talk. Still others were unable to state which of his remarks were made on his first visit and which on the second. Without determining the precise text of each speech, I find that Slayden, shortly after the start of work that morning, appeared in the egg candling room and instructed the girls to cease their gossiping and return to work; it appears that this talk among the employees related to the pros and cons of the Union.

Slayden continued by stating that he did not know why they tried to bring a union in because if they had come to him he would have done whatever was possible for them and might have been able to work it out so that the employees thereafter had Saturdays off. He said that if that was what they wanted he would try to get them Saturdays off. Slayden went on to state that they could work out matters without involving the Union and that while it was up to the employees whether or not they joined the Union, if they did he would be unable to let them off early and pay them until the closing hour, as he occasionally did on Saturdays. He also saw fit to mention that he could install machinery which would eliminate a lot of jobs, if they brought a union in.

Shortly after this speech, Slayden was advised that considerable sentiment existed among the employees in favor of withdrawing from the Union. He again visited the egg candling area and informed the girls that he knew of their sentiment

in favor of withdrawal from the Union. He stated that those who wished to withdraw could complete the particular task they were engaged in, and, if they wished, could leave at that time to withdraw their cards. He added that his automobile was available to them for that purpose, that they could have time off for that purpose, and that they would be paid until noon. The employees generally concluded their work by or before 11 a.m. that day. Slayden also approached two female employees who worked in the box room, stated that they could have time off to withdraw from the Union, and that he would furnish transportation if they desired it.

A group went to the union hall with the intent of withdrawing their cards and then telephoning the other employees at the plant as to the procedure to be followed. The union hall was closed, however, and they so advised the other employees at the plant. It is noteworthy that employee Carrie Monroe, a leader in the withdrawal movement on September 26, saw fit to speak to Slayden when she telephoned the plant, rather than other employees, and advised Slayden of their inability to withdraw the cards. It may be noted that this group including Monroe did not avail itself of the offer of Slayden's car but rather used their customary private transportation.

Monroe later succeeded in telephoning Secretary and Treasurer Lott of the Union and was advised by him that the cards had been sent to the Regional Office of the Board in support of the representation petition.

The record discloses that the employees were paid up to noon that day, their customary closing hour, although the last of the employees to leave work that day was through by 11 a.m., an hour Slayden admitted to be unusually early. The preponderance of the evidence discloses that in the past employees were paid up to noon on Saturdays when their work terminated between 11:40 a.m. and noon, but that they did not leave the plant before 11:50 or 11:55 a.m. This Saturday, the record discloses, was a normal Saturday and there was additional work of an identical nature which the employees could have performed that morning after the completion of the particular tasks on which they were engaged.

Slayden also saw fit to speak to a group of several employees who were waiting in an automobile pending receipt of information from the group led by Monroe on September 26. He told them that if they wanted something in the plant to ask him for it and if it was possible he would provide it. He stated that if they wished Saturdays off they should have come to him directly as he believed he could work out something for them.

The employees did not work on the following Saturday, October 3, and they have since been on a 5-day 40-hour week. The record does not disclose the total hours worked during the week ending October 3; nor does it disclose precisely what day, prior to October 3, they were advised that the work week had changed. However, their work week was

changed by lengthening the work day to compensate for the loss of time on Saturdays.

The findings as to Slayden's remarks on October 26 to the employees are based upon a synthesis of the testimony of Erma Herzinger and Evelyn Pharris. They were partly corroborated by Janet Stoddard who attributed certain statements to Slayden at his first talk on September 26 or an earlier occasion; however Slayden had not spoken to the employees as a group on an earlier occasion on this topic and I find that Stoddard, a somewhat reluctant witness for the General Counsel, referred to September 26. Moreover, Lott and Business Agent Doss credibly testified that they visited Slayden on September 28 and that he admitted to them he had told the employees on the previous Saturday, September 26, that he could install machinery which would eliminate some jobs; a similar remark it may be noted, was admittedly made by Slayden to employee Ruthe Jensen on September 24, as found above.

The General Counsel and Respondent did produce a number of witnesses whose testimony concerning Slayden's remarks on September 26 was confined solely to instructions to get back to work; a statement that he had been informed they wished to withdraw from the Union; that those who wished to withdraw could finish their present tasks and leave for that purpose if they wished; and that his car was available for that purpose. They did not dispute that they were released early for the pur-

pose of withdrawal from the Union with pay until noon.<sup>7</sup>

There are in my belief several significant disparities in the testimony of this group of witnesses, which serve to cast doubt upon the reliability of their testimony.

(1) Carrie Monroe, who testified for the General Counsel, became strongly opposed to the Union and was a leader in the group which sought to withdraw on September 26 after Slayden's speech to the assembled female employees. She specifically denied that Slayden had said anything to the employees about the possibility of getting Saturdays off. Although demonstrating, while on the stand, her hostility to the General Counsel, she admitted that she "might have" informed the representative for the General Counsel about one week prior to the hearing that Slayden on September 26 had told the employees they might get Saturdays off if things worked out satisfactorily. When next asked if Slayden had in fact made this statement on September 26 she replied "He might have. I am not sure." In view of her demonstrated hostility to the pro-Union faction in the plant, I deem her admissions, stated above, to be significant and believe that they seriously impair the reliability of her testimony.

(2) Carrie Tofanelli was a reluctant witness for

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<sup>7</sup> Slayden admitted that he told the group of employees at the automobile that there was a chance they could be given Saturdays off. Otherwise his testimony, which I do not credit, comported with that of the witnesses in the above-identified group.

the General Counsel who originally testified that she did not recall Slayden making any references to Saturdays off in his September 26 remarks. She later admitted on the stand that she had informed the representative for the General Counsel approximately one week earlier that Slayden had told the employees on September 26 that they could have Saturdays off if they wished it and testified further that Slayden had in fact made this statement. On cross-examination by Respondent, she replied in the negative to the question whether Slayden had said anything beyond that the employees should get back to work and that, with respect to the Union, the employees could join or not as they chose.

(3) As heretofore noted, Slayden proceeded to give the employees Saturdays off, commencing the following Saturday, October 3, although there is absolutely no evidence that Respondent had such a plan under consideration, and they have since remained on a 5-day week. This serves to corroborate the testimony to the effect that he had promised them such a benefit in his remarks on September 26. While Respondent attempted to show that this was a regular procedure when work was slack, the record does not support this contention.

Firstly, even on the basis of Respondent's claim, Saturdays were previously not worked only in the slack season; however, the 5-day week was instituted between September 26 and October 3, 1953 and was still in effect as of the date of this hearing late in January of 1954, an apparently perma-

nent change. The fact is that there is no evidence that Respondent had such a move under consideration until Slayden took the initiative on September 24, asked employee Ruthe Jensen what the employees wanted, and was informed that, *inter alia*, they wished Saturdays off. Moreover, when Respondent did give the employees Saturdays off commencing on October 3, 1953, it was on the basis of otherwise increasing the daily hours Monday through Friday to make up the lost time and thus maintain the former total of 40 hours per week. Significantly, there is no evidence that the daily hours had ever been changed in this manner in the past.

Secondly, at least several of the female witnesses for Respondent testified that they had regularly worked Saturdays in the past. The testimony most favorable to Respondent came from Carrie Monroe who testified that she had "several" Saturdays off in 1952, and from Thora Panter, an employee since 1951, who testified that she did not work on Saturdays when things were slack "in the summertime of 1952." Slayden claimed that the girls had Saturdays off for a 6-week period during the months of July and August, 1952, when business was slow; there is no evidence that the employees received this day off at any time during previous years. However, Slayden elsewhere testified that the plant was busy only in the months of July and August and that the slack season lasted from August through June, a 10-month period. He also admitted that work was steady during this 10-month period.

All this I deem and find inconsistent with the claim that Respondent gave its employees Saturdays off in October of 1953 because of a temporary slackness of work.

Thirdly, at one place in his testimony, Slayden admitted that he had given the employees Saturdays off, commencing on October 3, because the employees through Jensen had asked for it on September 24 and that he then agreed to try it out. I find therefore that Respondent placed its employees on a 5-day week, abandoning Saturday work, on October 3 pursuant to the conversation on September 24 when Slayden asked what it was that the employees wanted and also pursuant to his remarks on September 26. I further find that such a move was not previously under consideration by management and that it was not caused by slackness of work. In fact, the record warrants the finding, as Ruthe Jensen, an employee of 8 years tenure testified, that the employees had always worked on Saturdays; that when business was slow those employees with the least seniority were released from Saturday work; and that Saturday work as such was required of the remainder. Significant here is the fact that Carrie Monroe, despite 11 years in Respondent's employ and a witness favorable to Respondent, could cite only "several" Saturdays in 1952 as instances when Saturdays were not worked.

### Conclusions

In considering the merits of the General Counsel's contention that Respondent has engaged in



an unlawful campaign of interference, restraint, and coercion, it may initially be noted that Slayden did not address his remarks to employees as part of the preparation of a case before the Board, because he specifically advised the Union that matters involving union representation were not within the jurisdiction of his office and were to be taken up with the Caldwell office 200 miles distant. Nor was his purpose merely to ascertain the extent of the union organizational campaign because he had previously been informed thereof in detail by two employees on September 23, this information including, in fact, the names of the union leaders. The simple answer is that Slayden considered the matter of elimination of the union majority among his employees to be within his jurisdiction and interjected himself into that issue, unlike the matter of union recognition which he specifically referred to a distant office.

Thus Slayden took the initiative on September 24 by summoning Ruthe Jensen, a leader in the organizational campaign, to his office. I find that Slayden on this occasion intended the foreseeable consequences of his conduct in calling Jensen to his office and speaking to her in this vein, namely, that Jensen, a leader in the union movement would report his remarks to her co-workers. Cf. *Radio Officers' Union vs. N.L.R.B., U.S.*, decided February 1, 1954. I find that Slayden's statements to Jensen on September 24, uttered in the reasonable expectation that they would be relayed to employees, and in fact substantially relayed to employees on that

date, were violative of the Act in the following respects:

(1) By, in the context of this case, questioning Jensen concerning her union activities. *N.L.R.B. vs. West Coast Casket Co., Inc.*, 205 F. 2d (C.A. 9).

(2) By stating that he knew the names of all who signed union cards and that Jensen was a leader in the union campaign, thus fostering the impression that he had been engaging in surveillance of union activities. *F. W. Woolworth Co.*, 101 NLRB 1457 and *Knickerbocker Plastic Co. Inc.*, 96 NLRB 586.

(3) By telling Jensen that Respondent was considering replacing employees with mechanical equipment. While Respondent had considered this move for some time, significantly, it had arrived at no decision with respect thereto. I find therefore that Respondent introduced the possibility of technological change as a threat of reprisal for union activities.

(4) By telling Jensen, after eliciting from her the information as to changes the employees wanted, that he might be able to improve working conditions by granting them Saturdays off, one of the changes desired by the employees.

I find that Respondent's conduct was violative of the Act in the following additional respects:

(5) The interrogation on September 24 by Slayden of employee Donna Christenson concerning her knowledge of the Union; his statement that he knew the identity of the union leaders and that Christenson was among them, again fostering the belief that

Respondent had engaged in surveillance of union activities; and the threat that if the Union organized the plant the employees would not receive their Christmas bonus and would lose their existing privilege of leaving work 5 or 10 minutes ahead of the scheduled hour at lunch and at the end of the work day.

(6) The interrogation on September 24 of Christenson by Foreman Talbot concerning her knowledge of the Union; his statement that Respondent knew the names of the union adherents among the employees, again fostering the belief that Respondent had engaged in surveillance of union activities; and his statement that if the Union did come in working conditions would be "a lot harder for everyone"; I find that this latter statement reasonably had reference to changes to be imposed by Respondent.

(7) Slayden's statements to the assembled employees on September 26 wherein he stated that had they come to him instead of the Union he might have been able to get them Saturdays off; his offer to try to get them Saturdays off; and Slayden's granting of paid time off for the purpose of withdrawal from the Union.<sup>8</sup>

(8) Slayden's statement on September 26 to another group of employees that he believed he could work out a change in working conditions so as to eliminate the requirement for Saturday work.

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<sup>8</sup> I do not rely herein on Slayden's offer of the use of his automobile for transportation to the union hall which was not accepted by the employees.

(9) The granting of Saturdays off between September 26 and October 3, effective October 3, pursuant to Slayden's thinly disguised promise on September 26 to grant the employees this improvement in their working conditions.

I find that by the above-enumerated instances of conduct, Respondent has interfered with, restrained and coerced its employees within the meaning of Section 8 (a) (1) of the Act. Nor is it germane, as Respondent stressed, that some of the employees allegedly were not intimidated by Respondent's conduct. The test is whether Respondent engaged in conduct "which may reasonably be said to interfere with the free exercise of employee rights under the Act." *Joy Silk Mills vs. N.L.R.B.*, 185 F. 2d 732 (C.A. D.C.) cert. denied 341 U.S. 914. I find that Respondent's conduct in this case reasonably had such an effect. See *Radio Officers' Union vs. N.L.R.B.*, *supra*. As stated by the Supreme Court in the last-cited case, in evaluating Section 8 (a) (3) of the Act, and in disregarding testimony by an employee that the employer's discrimination had neither encouraged or discouraged his union membership, "We read this language to mean that subjective evidence of employee response was not contemplated by the drafters, and to accord with our holding that such proof is not required where encouragement or discouragement can be reasonably inferred from the nature of the discrimination." See also *N.L.R.B. vs. Syracuse Color Press Inc.*, F. 2d (C.A. 2) decided January 5, 1954.

### C. The refusal to bargain

#### 1. The appropriate unit.

The complaint alleges and Respondent's answer admits that all employees of Respondent's Pocatello plant, including truck drivers but excluding office clericals, guards, professional employees and supervisors, constitute a unit appropriate for the purposes of collective bargaining. The parties stipulated that there were 26 named employees in the appropriate unit on September 24, 1953, the day that Respondent received the Union's request for recognition. The parties further stipulated that the unit might or might not be increased by the addition of one employee, Velma Armstrong, depending upon what the testimony disclosed with respect to the nature of her duties at the time material herein.

Turning to the case of Armstrong, I believe that emphasis must be attached to the period between September 24 and 26, because it was then, as shown above, that the Union's request for recognition was received by Respondent and that Respondent engaged in the conduct heretofore described. Armstrong, in her latest period of employment with Respondent, commenced work in June or July of 1953. Respondent's records which allegedly show the precise nature of her duties at various dates were not available at the hearing and Armstrong's testimony on the subject was marked by some uncertainty.

It appears however, that during a previous period of employment with Respondent, Armstrong had worked as an egg candler, a job within the scope of the delineated unit. She returned to Re-

spondent's employ in June or July of 1953 as an office clerical, a classification specifically excluded from the unit. However, in August of 1953, her duties were changed and her work week was divided so that she spent Mondays, Tuesdays and Fridays on egg candling, and Wednesdays, Thursdays and Saturdays in the office at clerical duties. With Saturday then a 5-hour day, it would appear that slightly over one half of her time was devoted to duties performed by others within the appropriate unit.

The problem here is to determine when Armstrong abandoned this arrangement in favor of her present part-time employment of 3 days a week devoted exclusively to office clerical work. In this respect, Slayden testified that Armstrong was employed on the divided work week basis for a period of 6 weeks to 2 months during August and September, and that "she candled right up until about the first of October," after which she was changed to her present part-time position as an office clerical. Respondent's records, according to Slayden, classified Armstrong as an egg candler during the months of August and September, 1953.

In view of the foregoing, I find that during the months of August and September, and particularly between September 24 and 26, 1953, the greater portion of Armstrong's time was devoted to duties as an egg candler; that she was placed by Respondent in the same classification as that of a majority of the female employees in the unit; and that this brought her within the scope of the unit. I find,

therefore, that during that period Armstrong had a substantial community of interest with her co-workers who are included in the appropriate bargaining unit, and that she is properly included in the bargaining unit for the period of the alleged refusal to bargain. I further find that the above-described unit, consisting of 27 employees and including specifically Velma Armstrong, constitutes a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

2. Majority representation in the appropriate unit.

In support of the allegation that the Union represented a majority of the 27 employees in the unit the General Counsel introduced in evidence 16 union designation cards signed by employees of the Pocatello plant of Respondent on September 21 and 22 of 1953; all appeared to be in order and Respondent does not attack the authenticity of the signatures thereon. Fifteen of these cards were identified by credible witnesses who witnessed the signatures to the cards. In addition, 13 of the 15 cards were either identified by the respective signers thereof or else the signers admitted that they had signed cards on the indicated dates of September 21 and 22. The sixteenth card was that of employee Erma Herzinger who identified her own card.

The record indicates, as Erma Herzinger and Ruthe Jensen credibly testified, that two other employees, Carrie Monroe and Nina Cordell, signed cards on September 22, or shortly before, designat-

ing the Union as collective bargaining representative; the cards were turned over to Secretary and Treasurer Lott of the Union and they were mislaid by his office personnel. Lott's testimony was substantially to the same effect. The testimony of Jensen with respect to the Monroe card is buttressed by the fact that Monroe admitted she had signed a card on or about the indicated date; however Cordell did not testify herein. Under the circumstances Monroe's card may properly be considered as a seventeenth designation of the Union; furthermore, in view of the secondary evidence with respect thereto which I accept under the circumstances, I find that Cordell also designated the Union as her collective bargaining representative, this constituting an eighteenth designation.

Respondent has attacked the validity of some of the cards, claiming that they were obtained through fraudulent tactics and that, as a result, the Union was not selected by a free choice of the employees of Respondent. The facts are as follows:

Although Zina Jensen's card was not one of the cards relied upon by the General Counsel as proof of the union majority, Respondent contended that the tactics allegedly used in the case of Jensen demonstrated the type of tactics which perforce were used in other cases. However, not only is there no evidence that the tactics claimed by Respondent to have been used in this instance by Erma Herzinger were used in other instances, but, in addition, the record does not support Respondent's contention herein as to Jensen.



The record shows that Jensen signed a card on or about September 23 at the request of Erma Herzinger; that five minutes later, Jensen changed her mind and asked Herzinger to return the card; and that the card was forthwith returned by Herzinger to Jensen. Respondent relies on Jensen's testimony on direct examination that she signed the card after Herzinger solicited her signature and that Herzinger on this occasion stated "it is for your protection. Otherwise if the union goes in you will be fired."

Herzinger, a clear and forthright witness whose testimony is credited here as elsewhere, denied that she had ever threatened Jensen or anyone else with discharge if she did not join the Union. Moreover, when Jensen repeated, on cross examination, the statements allegedly made by Herzinger, her version was substantially different, as were the implications thereof. On this occasion, Jensen testified that Herzinger solicited her signature on September 23 and stated "that it was for my protection; if I wanted to have protection, O.K., the union would protect me if I joined the union; otherwise I would be fired." Moreover, she further testified that Herzinger did not say that if the Union came into the plant and Jensen was not a member that Jensen would be discharged. This latter version would indicate, and I find, that Herzinger did not threaten Jensen on this occasion. At the very most, it would appear that Herzinger explained that the Union would protect Jensen, if she joined, against punitive or retaliatory action by Respondent, a

statement which lacks anything of a coercive nature.

Russell Going is another employee on whose testimony Respondent relies herein; he signed a union card on September 21 and his case differs from that of the other employees in that he was at the time a member in good standing of the Union. Going presented differing versions of what took place when he signed his card. He originally testified that several female employees asked him to sign because a majority had signed or had promised to sign and that one of these employees, identity not recalled, said that Going would be "fined" if he did not join the Union. On cross examination, he testified that it was employee Bill Hoffman, not one of those who solicited his signature, who told him on another occasion that he might be fined by the Union if he did not sign a card; it may be noted that Hoffman had no connection with the Union and did not solicit Going's signature for a card.

Going again repeated that the female employees asked him to sign, and that it was Hoffman who stated "there might be a chance of it (a fine) but I never did get the straight of it." (emphasis added) I find, in view of the foregoing, that Going's signature was not procured by those who solicited it on the basis of a threatened fine. Moreover, Going stated that he took no action with respect to terminating his union membership and did not know, as of the date of the hearing, whether he was still a member, although he allegedly paid no dues thereafter. Going testified that he decided to "let it ride to see what would happen." Significantly,

Going believed that he would be given an opportunity to vote in a Board election and, according to Foreman Talbot, was one of a group who, at a later date, still expressed a desire that the matter go to a vote. In view of Going's union membership at the time, namely September 21, 1953, I find that Going may properly be counted as one of those who selected the Union as a bargaining representative.

Bernard Godfrey testified that he signed a card on September 21, that Mr. and Mrs. Herzinger and Donna Christenson solicited his membership on that date, and that "They gave me to understand, I won't say they told me, but they led me to understand that most of the employees had signed these slips and they didn't want 60 or 70 or 80 per cent, but they wanted a hundred per cent" (emphasis added). According to Godfrey, he later discovered that he had been among the very first to sign.

Other evidence discloses that Godfrey was about the sixth to sign on September 21, although the record does not disclose how many, prior to Godfrey's signature, had previously promised to sign. Significant here is the fact, according to Foreman Talbot, that Godfrey at a later date was among those who still desired that the matter go to a vote after the Union had withdrawn its petition because of Respondent's unfair labor practices discussed above. In view of the foregoing, and particularly Godfrey's unwillingness to testify that the three-named individuals actually made these statements to him, I conclude and find that Godfrey was only stating his conclusions as to what was told him

when his signature was solicited, rather than what was said, and that there is no valid basis for refusing to count his card herein.

Respondent also adduced the testimony of Ora Panter who signed a card on September 22. Insofar as her testimony indicates, she signed a card after attending a union meeting on that date and there is no evidence of her solicitation, proper or otherwise. According to Panter, she regretted her decision to sign a card and, on the following day when she met Slayden in the plant, spoke to him and informed him that she was sorry that she had joined the Union. He allegedly replied that she could withdraw or stay in the Union as she chose. However, Panter elected to do nothing further about the matter until September 26 when she allegedly decided to withdraw, subsequent to Respondent's unfair labor practices discussed above, and was in the group that went to the union hall on that date.

However, I am more impressed by the fact that Panter, who voluntarily signed a union card on September 22, apparently without personal solicitation, took no affirmative steps to rescind that action prior to September 26 and prior to Respondent's conduct on that date. Her conduct is more impressive and is of more substance than her statement to Slayden on September 23 that she was sorry that she had signed a card because, despite his reply that she could withdraw or stay in as she chose, she patently preferred to keep the status quo, namely, to stay in. I find that Panter's card should properly be counted as evidence of the union majority.

See E. H. Sargent and Co., 99 NLRB 1318, and Kelly A. Scott, 93 NLRB 654.

Gene Ellsworth testified that he signed a card prior to the union meeting held on September 22, and that he did not know its purpose when he signed it. He admitted however, that he was told by Ruthe Jensen, who solicited his signature, that it was for the purpose of holding a meeting "to discuss the benefits, if any, with the union." I do not deem this inconsistent with the purposes of union representation and find that Ellsworth, who is not illiterate, intended to do precisely what the card indicated on its face, namely, designate the Union as bargaining representative. See Hunter Engineering Co., 104 NLRB No. 131.

### Conclusions

I am not unaware of the various cases, cited by Respondent, which condemn, and properly so, instances where a union card majority has been obtained through coercive or fraudulent tactics; however such is not the case here. And I am also in agreement with Respondent that an election conducted under Board auspices is a far more desirable and reliable means of ascertaining the true views of employees on the issue of union representation. In fact, the Union was initially in agreement with Respondent on that issue, inasmuch as it petitioned for an election on September 24, but withdrew its petition only after the commission of unfair labor practices by Respondent.

But if, on the other hand, Respondent's unfair

labor practices, as found above, have made the conduct of a fair and objective election impossible, and I so find, equity requires, if not demands, that the card check procedure should be resorted to in order to effectuate the purposes of the Act. It seems a anomalous and indeed flies in the face of the "unclean hands" doctrine of equity to conduct an election at the behest of the creator of conditions that prevent the conduct of a fair election because employees have been subjected to improper pressure. Section 9 (a) of the Act provides that a union designated or selected by a majority of the employees becomes their exclusive bargaining representative without regard to how that fact is established, whether by cards, petitions or strike. As one court has said, the "Act requires no specific form of authority to bargain collectively \* \* \* It is only necessary that (the union authorization) be manifested in some manner capable of proof whether by behavior or language." *Lebanon Steel Foundry vs. N.L.R.B.*, 130 F. 2d 404 (C.A. D.C.), cert. denied 317 U.S. 659. See also *N.L.R.B. vs. Bradford Dyeing Association*, 310 U.S. 318, and *N.L.R.B. vs. Kobritz*, 193 F. 2d 8 (C.A. 1). And, as recently stated by another Court, "Although the result of a secret election may well be the most convincing means of expression, the election medium is by no means exclusive." *N.L.R.B. vs. Indianapolis Newspapers, Inc.*, F. 2d (C.A. 7), decided February 19, 1954.

The record amply demonstrates that on September 26, subsequent to Slayden's statements to the

employees on September 24 and 26, hereinabove found to be violative of the Act, the employees readily adopted his suggestion that they withdraw from the Union. Although this decision on their part was not formalized, due to the absence of the cards, it must be assumed that the employees of Respondent repudiated the Union on September 26.

The language of the Supreme Court in a strikingly similar case which, if anything, was not as strong as the present one is of interest. The Court there stated: "Petitioner cannot, as justification for its refusal to bargain with the Union, set up the defection of union members which it had induced by unfair labor practices, even though the result was that the union no longer had the support of a majority. It cannot thus, by its own action, disestablish the union as the bargaining representative of the employees, previously designated as such of their own free will." *Medo Photo Corp. vs. N.L.R.B.*, 321 U.S. 678.

I find, therefore, that at all times material herein, and particularly on September 24 and 26, the Union, having been validly designated as bargaining representative by 18 of the 27 employees then in the bargaining unit, was and is the representative of the employees in the above-described appropriate unit, for the purpose of collective bargaining, within the meaning of Section 9 (a) of the Act.

### C. The refusal to bargain

As heretofore set forth, the Union achieved a majority status among the employees in the ap-

propriate unit on September 22. Its letter to Respondent, announcing its majority status and asking for a meeting, was received by Branch Manager Slayden on September 24. On September 26 Slayden replied to the Union, stating that matters of this nature "are not within the jurisdiction of this office" and that the letter was being forwarded to Respondent's office at Caldwell for consideration by Respondent's management and board of directors. On October 1, Respondent and the Union entered into an agreement for a consent election which was not held due to the subsequent withdrawal of the representation petition by the Union.

What impresses me as the crux of this case is that Slayden who on September 26 referred the Union's request for a meeting to another office 200 miles distant, almost contemporaneously on September 24 and September 26 engaged in unfair labor practices, as found above, whose only objective was clearly to destroy the union majority and to bring about the repudiation of the Union by the employees; in fact, Slayden achieved his objective on September 26 because the record shows that the employees, after his talks on that date, turned against the Union.

Had his statements on September 24 and 26 been confined to protected expressions of opinion, the case might be viewed in a different light. The fact is however, as found above, that he raised the possibility of the employees being replaced by mechanical equipment, a change not then decided upon by Respondent; fostered the impression that Re-



spondent was engaging in surveillance of union activities; after ascertaining that the employees wanted such a change, stated that he might be able to give the employees Saturdays off, a move not previously under consideration by Respondent; interrogated union employees concerning union activities; and gave them paid time off in order to withdraw from the Union. He, as well as Foreman Talbot, told an employee that existing privileges might be curtailed and working conditions made more onerous if the Union entered the plant.

All these acts of interference, restraint and coercion, constituted an attempt to undermine and destroy the Union's position as majority bargaining agent, and constituted a rejection of the collective bargaining principle. On this record, Respondent cannot contend, because it did not then contend, that it entertained any doubt as to the Union's representative status. Significant herein, and illustrative of bad faith, is the fact that Slayden engaged in this conduct at the very time that he took the position with the Union that the problem of meeting the Union was not within the jurisdiction of his office and referred the Union to Respondent's Caldwell office. See *Georgia Twine and Cordage Co.*, 76 NLRB 84.

That Respondent succeeded in its objective of destroying the union majority affords it no privilege to "reap the benefits of its obstructive and unlawful acts." *N.L.R.B. vs. Poultry Enterprises, Inc.*, 207 F. 2d 522 (C.A. 5). The Supreme Court has stated that "The unfair labor practices of the respondent

cannot operate to change the bargaining representative previously selected by the untrammelled will" of its employees. *N.L.R.B. vs. Bradford Dyeing Association*, 310 U.S. 318. The Supreme Court further stated in *Medo Photo Corporation vs. N.L.R.B.*, *supra*, under similar circumstances, that a refusal to bargain caused by an employer's own unfair labor practices "was but an aggravation of its unfair labor practice in destroying the majority's support of the union."

Section 8 (a) (5) of the Act makes it an unfair labor practice for an employer to refuse to bargain with the representative designated by a majority of his employees within an appropriate bargaining unit. It does not say that the employer's obligation to bargain is conditioned upon a Board certification nor indeed upon submission by a labor organization of any proof of its representative status. The Board has recognized the equitable principle that an employer who entertains a genuine doubt as to a union's majority status should be entitled to have the doubt resolved before being required to bargain and has absolved an employer of his obligation to bargain if the refusal is motivated by a good faith doubt as to majority status.

But since this exception is grounded upon equitable principles, the Board has not permitted an employer to avoid this obligation to bargain with a majority representative where the employer engages in unfair labor practices which tend to dissipate that majority status or prevent a free choice in a

subsequent election. It would seem axiomatic that an employer may not by his own misconduct destroy a union's majority and then claim to be relieved of his duty to bargain with it on the ground that the Union is no longer a majority representative.

Accordingly I find, on this record, that Respondent, after receiving the Union's request for a meeting on September 24, 1953, by engaging in unfair labor practices on that date as well as on September 26, as well as by unilaterally granting its employees Saturdays off, as heretofore found, has refused to bargain with the Union within the meaning of Section 8 (a) (5) of the Act. See *Medo Photo Corp. vs. N.L.R.B.*, *supra*; *Motorola, Inc. vs. N.L.R.B.*, 199 F. 2d 82 (C.A. 9) cert. den. 344 U.S. 913; *N.L.R.B. vs. W. T. Grant Co.*, 199 F. 2d 711 (C.A. 9) cert. den. 344 U.S. 928; *N.L.R.B. vs. Howell Chevrolet Company*, 204 F. 2d 79 (C.A. 9) aff'd U.S., decided December 14, 1953; *Service Parts Company*, 101 NLRB 1172, enf'd January 27, 1954 (C.A. 9); and *Williams Lumber Co.*, 93 NLRB 1672, enf'd 195 F. 2d 669 (C.A. 4) cert. den. 344 U.S. 834. I find that by said refusal to bargain Respondent has further interfered with, restrained and coerced its employees within the meaning of Section 8 (a) (1) of the Act.

#### IV. The effect of the unfair labor practices upon commerce

The activities of Respondent, set forth in Section III above, occurring in connection with its business

operations described in Section I above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

### V. The remedy

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Having found that Respondent has unlawfully refused to bargain with the Union as the representative of its employees in an appropriate unit, it will be recommended that Respondent upon request bargain with the Union and, if an understanding is reached, embody such understanding in a written and signed agreement.

Because of Respondent's demonstration of its willingness to resort to unlawful methods to counteract an attempt by its employees to achieve self-organization through a labor organization of their own choosing, the inference is warranted that the commission of other unfair labor practices may be anticipated. It will therefore be recommended that Respondent be ordered to cease and desist from in any manner interfering with, restraining or coercing its employees at the Pocatello plant in the exercise of the rights guaranteed by the Act.

Upon the basis of the foregoing findings of fact, and upon the entire record in the case, I make the following:

### Conclusions of Law

1. Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local 983, AFL, is a labor organization within the meaning of Section (2) (5) of the Act.

2. By interfering with, restraining and coercing its employees in the exercise of the rights guaranteed by Section 7 of the Act, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

3. All employees of Respondent's plant at Pocatello, Idaho, including truck drivers, but excluding office clericals, guards, professional employees and supervisors, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

4. Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local 983, AFL, was on September 24, 1953, and at all times thereafter has been and now is, the exclusive representative of all employees in the aforesaid appropriate unit for the purposes of collective bargaining, within the meaning of Section 9 (a) of the Act.

5. By refusing on September 24, 1953, and at all times thereafter, to bargain collectively with the Union as the exclusive representative of the employees in the aforesaid appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (5) of the Act.

6. The aforesaid unfair labor practices are un-

fair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

### Recommendations

Upon the basis of the foregoing findings of fact and conclusions of law, I recommend that Respondent, Idaho Egg Producers, Pocatello, Idaho, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local 983, AFL, as the exclusive representative of all employees at its Pocatello, Idaho, plant, including truck drivers, but excluding office clericals, guards, professional employees and supervisors.

(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization to form labor organizations, to join or assist the above-named or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization, as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action which I find will effectuate the policies of the Act:

(a) Upon request, bargain collectively with Teamsters, Chauffeurs, Warehousemen and Helpers

Union, Local 983, AFL, as the exclusive representative of all employees at Respondent's Pocatello plant, including truck drivers, but excluding office clericals, guards, professional employees and supervisors, with respect to wages, rates of pay, hours of employment or other terms or conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its plant at Pocatello, Idaho, copies of the notice attached hereto and marked Appendix A. Copies of said notice, to be furnished by the Regional Director for the Nineteenth Region, shall, after being duly signed by Respondent's representative, be posted by Respondent immediately upon receipt thereof and maintained by it for a period of sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for the Nineteenth Region in writing, within twenty (20) days from the date of receipt of this Intermediate Report and Recommended Order what steps it has taken to comply herewith.

It is recommended that, unless on or before twenty (20) days from the date of receipt of this Intermediate Report and Recommended Order, Respondent notifies the aforesaid Regional Director in writing that it will comply with the foregoing rec-

ommendations, the National Labor Relations Board issue an order requiring it to take such action.

Dated this 23rd day of March, 1954.

/s/ MARTIN S. BENNETT,  
Trial Examiner.

## APPENDIX A

Notice To All Employees Pursuant to the Recommendations of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We Will bargain collectively, upon request, with Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local 983, AFL, as the exclusive representative of all employees at our Pocatello, Idaho plant, including truck drivers, but excluding office clericals, guards, professional employees and supervisors, with respect to wages, rates of pay, hours of employment, or other terms or conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

We Will Not in any other manner interfere with, restrain or coerce our employees in the exercise of the right to self-organization, to form labor organizations, to join or assist the above-named or any other labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid



or protection, or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment in conformity with Section 8 (a) (3) of the Act.

All our employees are free to become or remain, or refrain from becoming or remaining, members of the above-named or any other labor organization.

IDAHO EGG PRODUCERS

(Employer)

By .....,

(Representative) (Title)

Dated.....

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

\_\_\_\_\_

[Title of Board and Cause.]

EXCEPTIONS TO INTERMEDIATE REPORT  
AND RECOMMENDED ORDER OF  
RESPONDENT

Idaho Egg Producers, Respondent in the above entitled case, takes exception to the Intermediate Report and Recommended Order and the whole thereof on the grounds and for the reasons that the same is not supported by substantial evidence and on the further grounds that the facts in this case do not constitute a violation of Section 8 (a)

(1) and (5) or any of the provisions of the National Labor Relations Act.

Respondent takes exception to the findings on Page 5 of the Intermediate Report as a basis for a finding that the Respondent had interfered, restrained or coerced it's employees inasmuch as the findings on Page 5 of the Intermediate Report contain no threats or promises except as the same may be inferred by the Trial Examiner. All of the findings found on Page 5 are merely statements of fact by the manager as to conditions pertaining to the employees' employment concerning bonuses, labor-saving devices, machinery and overtime and in this connection it is significant to report that at all of the manager's conferences with the employees he made it quite clear that the question of joining or not joining the union was entirely up to the employees.

Respondent objects to the findings on Page 6 of the Report wherein the Trial Examiner gives credit to all of the testimony of all of the witnesses for the union and categorically discredits all of the testimony of witnesses stating facts favorable to the Respondent.

Respondent objects to the findings of fact contained between Lines 25 and 40 on Page 6 of the Report wherein the Trial Examiner found that the manager's statement that he had seasonally closed the operation on Saturdays was not true. The Trial Examiner did admit that his decision in this respect was a very "close resolution" on his part.

Respondent takes exception to the finding be-

tween Lines 46 and 60 on Page 6 of the Report wherein the Trial Examiner found that in the conversation between Employee Christenson and Manager Sladen, Sladen stated that while it made no difference to him whether or not she joined the union, the employees would lose five to ten minutes of lunch period or their time off at closing time. This finding is immaterial and not proper to support a conclusion of law.

The findings contained on Page 7 of the Intermediate Report, with reference to the meeting on Saturday morning, September 26, are supported by evidence except as to that part wherein the Trial Examiner found that the manager had threatened the employees with loss of pay or loss of time off inasmuch as the record shows by testimony from both the manager and employees that the company has always given time off if the jobs were finished ahead of time and has seasonally given Saturdays off.

As to the remainder of the findings on Page 7, which are supported by evidence, Respondent contends that they contain no threats or promises and are, therefore, not a violation of the law and should not be considered by the Trial Examiner for that purpose.

Respondent objects to the finding on the part of the Trial Examiner contained on Page 8 of the Report that it was an interference with the union's activities for the manager to offer the use of the company car for the purpose of having the employees withdraw from the union. This is an im-

proper finding on the part of the Trial Examiner inasmuch as the decision to withdraw from the union had been made voluntarily by the employees because they had been deceived concerning the election and for other reasons stated by the employees before the offer was made. Respondent objects on the further grounds that the testimony shows that it was a customary practice for the company to use the automobile for emergency or other errands of the business and employees.

Respondent objects to the finding by the Trial Examiner on Page 8 between Lines 25 and 30 with reference to the report by Employee Monroe that she had telephoned the Secretary and Treasurer of the union and was advised by him that the cards had been sent to the Regional Office, on the grounds that the Trial Examiner failed to complete the actual report made by Employee Monroe. Said employee, in addition to reporting that the cards had been mailed to the Regional Office, also reported that the representative of the union said that the entire question would be decided by an election and that the employees were not in the union. (Tr. 225, 226) The Trial Examiner doesn't include this in his findings.

Respondent objects to the findings with reference to the time off taken on Saturday, September 26, as the testimony shows it was customary for the company to permit the employees to quit early when they had completed the particular job assigned to them.

With reference to the second meeting between

the employees and the manager on Saturday, September 26, the record discloses that the meeting was opened by a statement by the manager that he knew that the employees wanted to withdraw from the union, or words to that effect, and by the further statement that it was entirely up to the employees as to whether they joined the union or not or remained in the union, or not, or words to that effect. Under this statement of facts, Respondent objects to the use of the statements made in this second meeting as a basis for a finding by the Trial Examiner inasmuch as the employees had made up their minds on a course of action prior to this meeting, and that none of the statements made by the manager could have influenced the actions on the part of the employees.

Respondent takes exception to the findings contained on Pages 9 and 10 of the Report with reference to the credibility of the witnesses, it appearing from said findings that the Trial Examiner gives full faith and credit to all of the witnesses testifying on behalf of the union with no faith or credit to the testimony of the witnesses testifying on behalf of the Respondent, particularly with reference to the finding that the Respondent did not regularly and seasonally give the employees Saturday off, it appearing from the record that at least four employees verified this fact as stated by the manager.

Respondent takes exception to the finding by the Trial Examiner that the foreman called Employee Jensen to his office for the purpose of using her

as a means of conveying information to the employees, it appearing from the record that Employee Jensen was the self-appointed representative of a group of employees and was seeking information from and trying to give information to the company. Respondent further objects to the findings on Page 11 that the Respondent had

- (1) questioned the employees concerning their union activities,
- (2) engaged in any surveillance of the union's activities,
- (3) threatened the replacement of employees by mechanical equipment,
- (4) promised to improve working conditions or give Saturdays off,
- (5) threatened to take away Christmas bonuses,
- (6) made any threats to the employees as to what would happen if the union came in,
- (7) any statements by the foreman in the form of a threat or promise in case the union did not come in,

said findings being inferences and without substantial or supporting evidence.

### Refusal to Bargain

Respondent takes exception to the findings between Lines 25 and 40 on Page 13 of the Report to the effect that the Employee Armstrong's time was devoted principally to egg candling when the record shows that she was classified as an office employee and therefore outside the appropriate unit.

Respondent objects to the finding on the part of

the Trial Examiner that there were eighteen signed cards designating the union as the collective bargaining representative on the grounds that said cards were not the voluntary acts of the employees. The record shows that the cards were, in fact, obtained by fraud with no meeting of the minds or agreement pertaining to the same.

Respondent takes exception to the findings on the part of the Trial Examiner contained on Pages 14, 15 and 16 of the Report with reference to the employees Jensen, Going, Godfrey, Panter and Ellsworth wherein the Trial Examiner discredits their testimony, it appearing from the record, and contrary to the Trial Examiner's findings, that these employees, together with others, had been induced to sign representation cards under false representations and that the signatures were obtained by fraud.

It appears from the entire record in this case that a majority of the employees signed representation cards based on at least three false representations:

- (1) that the employee in question was the last one to be signed up and that all the rest had signed cards;
- (2) that the signature to the card was merely being obtained for the purpose of having an election, nothing more; and
- (3) that if they did not sign the card they would be penalized by being discharged or otherwise fined.

The Trial Examiner ignores these facts in his

findings and categorically discredits all of the testimony with respect to these facts.

Respondent takes exception to the conclusion by the Trial Examiner found on Page 16 of the Report and particularly to the conclusion found between Lines 45 and 55 wherein the Trial Examiner states that the decision to withdraw from the union was made at the suggestion of the manager, Sladen. The entire record shows that the decision to withdraw from the union was caused by the dissension among the employees themselves. It was caused by the fact that the employees were not in favor of the union in the first place but were only induced to sign representation cards by false and fraudulent statements from the ring leaders representing the union. The entire case shows the lack of interest in the union by a majority of the employees and an over-abundance of enthusiasm on the part of three: Erma Herzinger, Marvin Herzinger and Donna Christensen.

Respondent takes exception to the finding on the part of the Trial Examiner that the company had refused to bargain, it appearing from the record that the company was at all times willing to bargain with the duly selected representative of its employees. It objects to the findings on the part of the Trial Examiner that the Respondent, through its acts, had in any way dissipated the union majority inasmuch as the union at no time had an uncoerced majority. The facts in the case clearly show that the employees wanted the question of representation to be decided by an election. The



facts further show that the Respondent was agreeable to and had consented to the election which, in the opinion of the Respondent, is the proper way to determine the question.

\* \* \* \* \*

In conclusion, Respondent respectfully requests that the Intermediate Report and Recommended Order be nullified.

Respectfully submitted,

ELI A. WESTON,

RICHARDS, HAGA & EBERLE,

Attorneys for Respondent

April, 1954.

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United States of America  
Before the National Labor Relations Board  
Case No. 19-CA-924

IDAHO EGG PRODUCERS

and

TEAMSTERS, CHAUFFEURS, WAREHOUSE-  
MEN AND HELPERS UNION, LOCAL 983,  
AFL.

### DECISION AND ORDER

On March 23, 1954, Trial Examiner Martin S. Bennett issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter,

the Respondent filed exceptions to the Intermediate Report and a supporting brief.<sup>1</sup>

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and brief, and the entire record in the case and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.<sup>2</sup>

### Order

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Idaho Egg Producers, Pocatello, Idaho, and its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local 983, AFL, as the exclusive representative of all employees at the Respondent's Pocatello, Idaho plant, including truck drivers, but excluding office clericals, guards, professional employees and supervisors as defined in the Act.

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<sup>1</sup> As the record, exceptions, and brief adequately present the issues and positions of the parties, we deny the Respondent's request for oral argument.

<sup>2</sup> In Section III B of the Intermediate Report, the Trial Examiner inadvertently referred to Slayden's remarks on October 26, instead of September 26.

(b) Interrogating employees concerning their membership in, or activities on behalf of Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local 983, AFL or any other labor organization, in a manner constituting interference, restraint or coercion in violation of Section 8 (a) (1) of the Act; fostering the impression upon employees that the Respondent was keeping union activities under surveillance; threatening employees with the loss of employment by installing labor saving machinery in reprisal for union activities; offering and granting employees Saturdays off to induce them to abandon any union; threatening to deprive employees of their Christmas bonus and other privileges customarily enjoyed by them if a union succeeded in organizing the plants; and granting employees paid time off for the purpose of withdrawing from any union.

(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form labor organizations, to join or assist the above-named or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization, as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action which the

Board finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local 983, AFL, as the exclusive representative of all employees at the Respondent's Pocatello plant, including truck drivers, but excluding office clericals, guards, professional employees and supervisors as defined in the Act with respect to rates of pay, wages, hours of employment, and other conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its plant at Pocatello, Idaho, copies of the notice attached hereto as an appendix.<sup>3</sup> Copies of said notice, to be furnished by the Regional Director for the Nineteenth Region, shall, after being duly signed by the Respondent's representative, be posted by the Respondent immediately upon receipt thereof and maintained by it for a period of sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for the Nine-

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<sup>3</sup> In the event that this Order is enforced by decree of a United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals Enforcing an Order."

teenth Region in writing, within ten (10) days from the date of this Order as to what steps it has taken to comply herewith.

Dated, Washington, D. C., January 6, 1955.

[Seal]            GUY FARMER, Chairman  
                    ABE MURDOCK, Member  
                    IVAR H. PETERSON, Member  
                    PHILIP RAY RODGERS, Member  
                    National Labor Relations Board

## APPENDIX

Notice to All Employees Pursuant to a Decision and Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

We Will Not interrogate our employees concerning their membership in, or activities on behalf of Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local 983, AFL, or any other labor organization in a manner constituting interference, restraint or coercion in violation of Section 8 (a) (1) of the Act; foster the impression upon our employees that we are keeping union activities under surveillance; threaten our employees with the loss of employment by installing labor saving machinery in reprisal for their union activities; offer and grant our employees Saturdays off to induce them to abandon any union; threaten to deprive our employees of their Christmas bonus and other privileges customarily enjoyed by them if any union

succeeded in organizing our plant; or grant our employees paid time off for the purpose of withdrawing from any union.

We Will Not in any other manner interfere with, restrain or coerce our employees in the exercise of the right to self-organization, to form labor organizations, to join or assist the above-named or any other labor organization, to bargain collective through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment in conformity with Section 8 (a) (3) of the Act.

We Will bargain collectively, upon request, with Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local 983, AFL, as the exclusive representative of all employees at our Pocatello, Idaho, plant, including truck drivers, but excluding office clericals, guards, professional employees and supervisors as defined in the Act, with respect to wages, rates of pay, hours of employment, and other conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

IDAHO EGG PRODUCERS,  
(Employer)

By .....,  
(Representative) (Title)

Dated.....

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

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In the United States Court of Appeals  
for the Ninth Circuit

No. 14700

NATIONAL LABOR RELATIONS BOARD,  
Petitioner,

vs.

IDAHO EGG PRODUCERS,      Respondent.

**CERTIFICATE OF THE NATIONAL LABOR  
RELATIONS BOARD**

The National Labor Relations Board, by its Executive Secretary, duly authorized by Section 102.84, Rules and Regulations of the National Labor Relations Board—Series 6, as amended, hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record of a proceeding had before said Board, entitled “Idaho Egg Producers and Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local 983, AFL,” Case No. 19-CA-924 before said Board, such transcript including the pleadings and testimony and evidence upon which the order of the Board in said proceeding was entered, and including also the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

1. Order designating Martin S. Bennett Trial Examiner for the National Labor Relations Board issued January 25, 1954.

2. Stenographic transcript of testimony taken before Trial Examiner Martin S. Bennett on January 25, 26, 1954, together with all exhibits introduced in evidence.

3. Copy of Trial Examiner Martin S. Bennett's Intermediate Report and Recommended Order dated March 23, 1954 (annexed to item 8 hereof); order transferring case to the Board, dated March 23, 1954, together with affidavit of service and United States Post Office return receipts thereof.

4. Respondent's letter dated March 26, 1954, requesting extension of time to file exceptions and brief.

5. Copy of Board's telegram, dated April 2, 1954 granting Respondent's request for extension of time to file exceptions and brief.

6. Respondent Company's request for oral argument before the Board, dated April 27, 1954. (Denied, see Board's Decision and Order, page 1, footnote 1.)

7. Respondent Company's Exceptions to the Intermediate Report and Recommended Order received April 27, 1954.

8. Copy of Decision and Order issued by the National Labor Relations Board on January 6, 1955, with Intermediate Report annexed, together



with affidavit of service and United States Post Office return receipts thereof.

In Testimony Whereof, the Executive Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the city of Washington, District of Columbia, this 29th day of April, 1955.

[Seal]            /s/ FRANK M. KLEILER,  
Executive Secretary, National  
Labor Relations Board

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[Endorsed]: No. 14700. United States Court of Appeals for the Ninth Circuit. National Labor Relations Board, Petitioner, vs. Idaho Egg Producers, Appellee. Transcript of Record. Petition for Enforcement of an Order of the National Labor Relations Board.

Filed: May 2, 1955.

                  /s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.

[Title of U. S. Court of Appeals and Cause.]

PETITION FOR ENFORCEMENT OF AN  
ORDER OF THE NATIONAL LABOR RE-  
LATIONS BOARD

To the Honorable, the Judges of the United States  
Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Secs. 141, et seq.), hereinafter called the Act, respectfully petitions this Court for the enforcement of its order against Respondent, Idaho Egg Producers, Pocatello, Idaho, and its officers, agents, successors, and assigns. The proceeding resulting in said order is known upon the records of the Board as "Idaho Egg Producers and Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local 983, AFL," Case No. 19-CA-924. In support of this petition the Board respectfully shows:

(1) Respondent is a Idaho Corporation engaged in business in the State of Idaho, within this judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act, as amended.

(2) Upon due proceedings had before the Board in said matter, the Board on January 6, 1955, duly stated its findings of fact and conclusions of law, and issued an Order directed to the Respondent, Idaho Egg Producers, Pocatello, Idaho, and its

officers, agents, successors, and assigns. On the same date, the Board's Decision and Order was served upon Respondent by sending a copy thereof post-paid, bearing Government frank, by registered mail, to Respondent's counsel.

(3) Pursuant to Section 10 (e) of the National Labor Relations Act, as amended, the Board is certifying and filing with this Court a transcript of the entire record of the proceeding before the Board upon which the said Order was entered, which transcript includes the pleadings, testimony and evidence, findings of fact, conclusions of law, and the Order of the Board sought to be enforced.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon Respondent and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon the Order made thereupon a decree enforcing in whole said Order of the Board, and requiring Respondent, and its officers, agents, successors and assigns, to comply therewith.

Dated at Washington, D. C., this 23rd day of March, 1955.

/s/ By MARCEL MALLET PREVOST,  
Assistant General Counsel, Na-  
tional Labor Relations Board

[Endorsed]: Filed March 25, 1955. Paul P. O'Brien, Clerk.

[Title of U.S. Court of Appeals and Cause.]

## ANSWER

To the Honorable, the Judges of the United States  
Court of Appeals for the Ninth Circuit:

Comes Now the Respondent and for its answer to the Petition for Enforcement denies that the Board has a right to have this Court issue its Order for Enforcement since the Order of the National Labor Relations Board is without foundation in evidence. Respondent denies each and every allegation contained in the Petition except as to those things that are hereinafter admitted, qualified or explained.

### I.

Respondent admits that it is an Idaho corporation engaged in business in the State of Idaho and within this Court's Judicial Circuit, and admits that the Board's Order and Decision was served upon Respondent by sending a copy thereof by registered mail to Respondent's counsel.

### II.

In objecting to the Petition for Enforcement, Respondent denies that the Union, Local 983 Teamsters, Chauffeurs, Warehousemen and Helpers, at any time was the authorized representative of a majority of Respondent's employees, and in connection therewith Respondent alleges that the evidence adduced before the Trial Examiner clearly disclosed that the applications for member-

ship in the union procured by the union were procured by threats, promises and false statements, to-wit: (1) That if they did not sign the card they would be penalized by being discharged or otherwise fined. (2) That the signature to the card was being obtained for the purpose of having a election, nothing more. (3) That the employee in question was the last one to be signed up and that all the rest had been signed up.

That the testimony before the Trial Examiner further shows that at the time of the hearing the employees were dissatisfied with the union and that a majority of the employees did not want the union as their bargaining agent.

### III.

Respondent denies that the evidence in the case supports the finding by the Trial Examiner that the Respondent had violated Section 7 of the Act or any other provisions of the Act and specifically denies that it in any way interfered with, restrained or coerced its employees contrary to the provisions of the Labor-Management Relations Act or the National Labor Relations Act as amended, but on the contrary the evidence before the Trial Examiner clearly established that the employees, having been coerced and having been forced into the union against their will, were indifferent to the union's progress and dissatisfied with the union and by their own voluntary acts disassociated themselves from the union, all of which is established by the evidence in the case. The testimony before the Trial

Pursuant to notice, the above-entitled matter came on for hearing at 10 o'clock a.m.

Before: Martin S. Bennett, Trial Examiner.

Appearances: Eli Weston and J. L. Eberle, 518 Idaho Bldg., Boise, Idaho, appearing for Idaho Egg Producers, Respondent; Alan A. Bruckner, 19th Region, National Labor Relations Board, Seattle, Wn., 407 U. S. Courthouse, Seattle, Wn., appearing as counsel for the General Counsel; Clarence Lott, 456 North Arthur, Pocatello, Idaho, appearing for Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local 983, AFL, Charging Party. [1\*]

Trial Examiner Bennett: The hearing will be in order. [3]

\* \* \* \* \*

Mr. Brucker: If the Examiner please, I should like to call the Examiner's attention to the fact that General Counsel's Exhibit 2, paragraph I thereof, admits the following allegations of the complaint: paragraphs I, II and V. Paragraphs I and II describe the operations of the company and the facts which the General Counsel contends constitute sufficient facts to enable [6] the Board to take jurisdiction. Paragraph V sets forth the appropriate unit.

It is also my understanding, having discussed this with counsel prior to the opening of the hearing, that counsel will in fact stipulate to paragraph

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\* Page numbers appearing at top of page of original Reporter's Transcript of Record.

IV of the complaint, namely that the union involved in this proceeding is a labor organization within the meaning of the Act, Section 2 (5) of the Act.

Mr. Weston: That is correct.

Mr. Brucker: Thank you, sir.

Trial Examiner Bennett: I said before that the General Counsel will have to prove his case. Of course, if the answer admits certain subject matter in the complaint, I don't intend my statement to extend to that.

We will take a five-minute recess.

(Short recess.)

Trial Examiner Bennett: On the record.

Mr. Brucker: I will call Mr. Clarence Lott.

### CLARENCE LOTT

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

#### Direct Examination

Q. (By Mr. Bruckner): State your name and address, please.

A. Clarence Lott, 456 North Arthur; that is my business address.

Q. What is your residence address? [7]

A. 210 East Chapel, Pocatello, Idaho.

Q. Are you an employee of Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local 983, AFL?

A. Yes, sir.

Q. Hereafter in my questions to you and during

(Testimony of Clarence Lott.)

all our discussions I will refer to that as "the Union". What is your office in that union, sir?

A. Secretary and treasurer.

Q. How long have you held that office?

A. About eight years.

Q. Is it part of your duties as secretary and treasurer of that union to organize employees in various establishments?      A. It is.

Q. I will direct your attention to Tuesday, September 22, 1953. Do you recall that date?

A. Yes, sir.

Q. I will ask you if during the evening of that day you had a meeting of employees of Idaho Egg Producers at the Labor Temple.      A. We did.

Mr. Bruckner: If the Examiner please, I understand that the caption of the formal papers herein incorrectly describes the name of the company. It is my understanding, as a result of discussion off the record, that the true and correct name of the company involved herein is "Idaho Egg Producers" and I therefore move to amend the formal papers and to correct the [8] name of the company to so show.

Mr. Eberle: No objection.

Mr. Brucker: Thank you.

Trial Examiner Bennett: Actually you are moving to delete the last three words in the caption?

Mr. Bruckner: Yes, sir.

Trial Examiner Bennett: All right. The motion is granted.



(Testimony of Clarence Lott.)

Q. (By Mr. Bruckner): How many employees of Idaho Egg were present at that meeting, sir?

A. Nineteen.

Q. Did you count them? A. Yes.

Q. And what was the subject of discussion at that meeting?

A. The employees had asked several questions as to what the union could do for them and what the capacity of a union was and I explained to the employees the procedure that would be followed, that a majority of the employees had signed authorizations authorizing the Teamsters, Chauffeurs, Warehousemen and Helpers, Local 983, to bargain for them as pertains to wages and hours, conditions of employment, and that if the company would acknowledge the authorizations that the negotiations could commence at once; and that if the company did not desire to acknowledge the authorizations, then a petition would be filed with the National Labor Relations Board and we would have to wait for the outcome of the petition or a [9] certification before we could commence negotiations.

\* \* \* \* \*

Q. (By Mr. Bruckner): Would you in your testimony here, Mr. Witness, confine yourself to what people said, as best you can recall, in either words or substance at that meeting.

Mr. Eberle: We object to that general question. I don't see how the employer could be bound by comments made at that meeting.

Trial Examiner Bennett: I will take it as evi-

(Testimony of Clarence Lott.)

dence of the union organizational campaign. [10]

\* \* \* \* \*

A. (Continuing) Godfrey made the statement that the employer would not recognize the union, he was sure of the fact, and so I explained to the employees that in that case we would file for an election the next morning with the National Labor Relations Board and we would also——

Mr. Eberle (Interrupting): My objection goes to all of this line of testimony, that the employer could not possibly be bound by these statements, as to opinions of various employees.

Trial Examiner Bennett: All right. I will give you a running objection.

A. (Continuing) So I explained to the employees that the following morning we would file for an election with the National Labor Relations Board and at the same time would write a letter requesting the employer to bargain with us and that after the employer had had time to receive the letter, that we would personally contact the employer, requesting bargaining.

Q. (By Mr. Bruckner) Do you know Mr. Talbot, an employee of the company?

A. Not personally, no.

Q. To your knowledge, were any supervisors of the company present at that meeting?

A. Not to my knowledge.

Q. Have you seen Mr. Talbot? [11]

A. I seen a gentleman that, over in the opera-

(Testimony of Clarence Lott.)

tion as I went through, which, that was pointed out as Mr. Talbot.

Q. Did you on the next day send out a letter to the company?           A. I did.

Mr. Bruckner: Will the reporter mark this document, a letter, typewritten, dated September 23, 1953, addressed to Mr. C. C. Slayden, Idaho Egg Producers, Pocatello, Idaho, and bearing a signature purporting to be that of Clarence Lott, Teamsters Local Union 983, as General Counsel's Exhibit 3 for identification. [12]

\* \* \* \* \*

Q. (By Mr. Bruckner): I should like to ask you, Mr. Lott, if the original of what is now in evidence as GC-3 was not written on a piece of paper bearing the letterhead of your organization.

A. It was.

Mr. Bruckner: Would the counsel so stipulate?

Mr. Eberle: We will so stipulate.

Mr. Bruckner: Thank you.

I should like permission from the Examiner to withdraw the original GC-3 and introduce in evidence a true copy of that exhibit, if there is no objection.

Trial Examiner Bennett: Granted.

Q. (By Mr. Bruckner): Mr. Lott, did you also send to the National Labor Relations Board at Seattle, Washington, a petition to represent employees of Idaho Egg Producers Co-op Marketing Association?           A. I did.

(Testimony of Clarence Lott.)

Mr. Bruckner: May we be off the record for a moment, sir?

Trial Examiner Bennett: Off the record.

(Discussion off the record.)

Trial Examiner Bennett: On the record.

As I understand it, counsel are willing to stipulate that Mr. C. C. Slayden is branch manager of Respondent at Pocatello.

Mr. Eberle: So stipulated.

Mr. Bruckner: So stipulated.

Will the reporter mark for identification as GC-4 a petition [13] filed 9/24/53, the name of the employer being Idaho Egg Producers Co-op Marketing Association, signed by Clarence Lott, Secretary-Treasurer, Teamsters Local Union 983. [14]

\* \* \* \* \*

Mr. Bruckner: I am prepared to stipulate that GC-3 was received by the company at the address designated on September 24, 1953.

Mr. Eberle: That is agreeable.

Trial Examiner Bennett: So stipulated.

Q. (By Mr. Bruckner): Did you receive a reply to this letter of September 23, Mr. Lott?

A. I did.

Mr. Bruckner: I would like to have marked for identification GC-5, a letter on the letterhead of Idaho Egg Producers, dated September 26, 1953, addressed to Mr. Clarence Lott, bearing the purported signature of one C. C. Slayden, Branch Manager. [15] \* \* \* \* \*

Q. (By Mr. Bruckner): Directing your atten-

(Testimony of Clarence Lott.)

tion to Monday, September 28, 1953, I will ask you, Mr. Lott, if you had occasion to visit the premises of the company at that time, on that date. Now, you understand, whenever I refer to the word "company" I am referring to Idaho Egg Producers.

A. Yes, sir.

Trial Examiner Bennett: This is only as far as the Pocatello [17] Branch?

Mr. Bruckner: Yes, sir. All of the testimony insofar as I am concerned in this matter is, deals only with the Pocatello Branch.

Q. (By Mr. Bruckner): Were you accompanied by anyone? A. By Dewey Doss.

Q. Who is he?

A. Business manager for Local 983 of the Teamsters.

Q. About what time of the day was this?

A. We went over about 10 o'clock.

Q. Did you see Mr. Slayden then?

A. No. We inquired from the office girl and she said Mr. Slayden was over in town and wouldn't return for approximately a half-hour or 45 minutes.

Q. Did you wait for him?

A. No. We left the plant and returned at a later date, or at a later hour.

Q. Did you see him then? A. Yes.

Q. Will you tell us, to the best of your recollection, what was said by whom at that time and who was present, sir?

A. We went into Mr. Slayden's office and I introduced myself as Secretary of the Teamsters

(Testimony of Clarence Lott.)

Local 983 and Mr. Doss as Business Representative of the Teamsters.

Q. Was anybody else present besides yourself, Mr. Doss and [18] Mr. Slayden at that time?

A. No, there was not.

Q. Will you continue, please?

A. And after the introduction I told him that the majority of the employees at the Idaho Egg at Pocatello had signed authorizations authorizing us to represent the employees and that we had that morning received a letter from him that it was referred to the Caldwell office and I asked him if they would get in direct touch with us or whether or not the word would come through the Caldwell office to him, that he was the local manager and we would like to, as far as contact we had, we would like to know the policy of procedure of the company, whether or not we could deal through him or whether it would be direct. He said it was all turned over to the Caldwell office and as yet he hadn't heard what their policy would be, whether they would deal with us or whether they would request an election, he did not know.

Q. (By Trial Examiner Bennett): Was this in the afternoon?

A. No. I think it was in the morning, about 11 o'clock or 11:30.

Q. You said, Mr. Lott, Mr. Doss is Business Representative of what, Local 983?

A. Yes.

Then Mr. Slayden said that he didn't like the

(Testimony of Clarence Lott.)

way we had come in the back door and stirred up the employees and organized [19] them, he didn't like our methods. And I informed Mr. Slayden that neither Mr. Doss nor myself had ever been on his premises before or, or, that is, on the company premises before, that was the first time, that is, that morning, that I had been inside of the Idaho Egg, that the employees themselves was the ones who had sought *or* organization. And he said that somebody had been in stirring them up and talking to them and telling them a lot of lies and that they did not, he did not need anybody, any labor organization, or a bunch of radicals, to tell him how to run his business. I told him we weren't a bunch of radicals, that the employees had a right to select a labor organization or anyone whom they seen fit to represent them and get a contract covering their employment and that that was their God-given right and that the company had no right to interfere in any way with the organization of the employees. I told him I understood that he had had a meeting with the employees the previous Saturday and he told me that was right, that he had had a meeting and he would talk to the employees any time that he seen fit, anywhere that he seen fit, that this was not Russia and that he had a right to talk to his employees. I told him that was true as long as he did not make any threats or any promises to the employees and that I had understood that he had threatened to discharge some of them, and he said, "Well, I don't need to discharge them for

(Testimony of Clarence Lott.)

belonging to a union or joining a union. You know well enough that if I want to discharge [20] an employee I can find plenty of reasons for discharging an employee, without discharging him for belonging to a union." I told him that I understood that he had told the employees that the company could put in machinery if they belonged to a union——

Q. (By Mr. Eberle—interrupting): Did you say he said or you said?

A. That I had understood that he had told the employees that they could put in machinery replacing the employees so that there would only be about three or four employees where there was now approximately 20 and he said, "That's right, I have got the plans right here in my safe. They are only waiting for my approval or disapproval to go in." And I asked him if he had told the employees that if it was economically feasible that the company would probably place in those, the machinery, whether or not they belonged to the union and he said no, he didn't think that was necessary. I told him I understood at the meeting that he had offered the employees transportation and pay for their time if they wanted to go down and withdraw from the union. He said that he had, "I have let employees off a lot of times with pay and", he said, "I never docked an employee's pay"—he didn't say never—he said, "There's lots of times that I do not dock employees when they go uptown on their own business. I asked him if he had checked



(Testimony of Clarence Lott.)

with the wage and hour, that was, that that was probably a violation of the Wage and Hour Law because it didn't reflect the true wages of the [21] employees if he gave the employees time off to conduct personal business without deducting from their time. And he said he had offered them to let them take his car to go up to the union. And I asked him if he had any objections to us talking to the employees, that during their lunch period or after hours, or before hours, when they were not working, that we had no intention of interfering in any way with the employees performing in their duties, and he said, "No, not unless I am present." And I said, "Do you mean you will not let us talk with the employees unless you are present?" And he said, "That is right", that he didn't want us talking to them at any time. He said, "I just can't stop you, but I want to be present at any time that you talk to the employees."

Q. (By Trial Examiner Bennett): Was this on company premises or otherwise that you are talking about?

A. I asked him to speak to the employees on the lunch period, so it would be on company premises; their lunchroom is in the basement of the operation. I was just talking to him about talking to the employees on their lunch period. There was no mention of company premises.

\* \* \* \* \*

Mr. Eberle: If the Examiner pleases, to this whole line of examination, I didn't realize how far

(Testimony of Clarence Lott.)

counsel was going with it, but I would like to have an objection to all of [22] this as not within the charge nor within the issues of this case. If the Examiner would reserve his ruling on it, this is going far afield of anything that is involved in this case. I didn't anticipate that he would be permitted to use hearsay evidence. I thought it was preliminary. But now apparently it is an effort to prove the whole case by things that he understood involving matters not within the charge or within the complaint.

Mr. Bruckner: I don't see where the objection has any validity, inasmuch, sir, the complaint itself alleges certain unfair labor practices. The testimony here relates to a conversation between the witness and the branch manager of the company bearing directly upon the unfair labor practices which are alleged, and what we have here are admissions of the branch manager who is the employee of the company, the representative of the company named in the complaint as the representative who did commit the unfair labor practices.

Trial Examiner Bennett: And therefore the hearsay rule would not be applicable?

Mr. Bruckner: That is correct.

Mr. Eberle: Excepting insofar as we cannot tell, when a man starts relating this long series of conversations, what he is going to say, and I would like to have my objection to all these answers, insofar as it exceeds the particular charges involved.

Mr. Bruckner: I should also like to point out

(Testimony of Clarence Lott.)

here, sir, that even with respect to any of those, of that matter that would appear at least on its face to go beyond the specifications in the charge, that it does, that it is material and relevant in terms of anti-unionanimus.

Mr. Eberle: That is a matter of argument. If we could just have the record preserve our objections.

Trial Examiner Bennett: The record will indicate your objection. I think I will indicate at this point, however, that insofar as possible unfair labor practice findings are concerned, I don't propose to find any beyond the scope of what is alleged in the complaint.

Mr. Eberle: All I am asking is that——

Trial Examiner Bennett (interrupting): I am not disagreeing with the General Counsel that the subject matter may be competent as an admission or that it may be competent to reflect the attitude of the agent or representative of the Respondent, but insofar as potential findings are concerned, I consider the complaint and answer as framing the issues before us.

Mr. Eberle: The record may then show our objections to any matters in these conversations in excess of the charges?

Trial Examiner Bennett: All right. [24]

\* \* \* \* \*

Q. (By Mr. Bruckner): I will direct your attention back to the meeting of September 22, which is the meeting of the employees at the Labor Temple, and I will ask you if you can recall whether any-

(Testimony of Clarence Lott.)

thing was said by any of the union representatives at that time with respect to disclosing the names of employees who signed authorization cards.

A. Yes, there was.

Q. What was said and by whom?

A. I told the employees that there would be, that we would not disclose to the company any of the names of the employees who had signed authorizations, that it would be necessary that those cards accompany the petition to the Board to show that we had the necessary representation to file for an election.

Q. Was that about all that occurred during the course of your conference with Mr. Slayden, sir, on September 28? I am now back to September 28, the conference with Mr. Slayden and yourself and Mr. Doss present.

A. Well, I told him that it might be embarrassing if he attended us addressing the employees but that we would be down to see the employees at a later date during their lunch period.

Q. Is that about all that occurred?

A. Yes, sir. [25]

Q. Subsequent to that time was a consent election agreement entered into by and between the company and the union?

A. Subsequent to what time?

Q. To September 28, sir, after September 28 was there a consent election agreement signed between the company and the union?

A. Yes, there was.

(Testimony of Clarence Lott.)

Mr. Bruckner: Will the reporter mark for identification as GC-6 a document entitled "Agreement for Consent Election", bearing signatures purporting to be those of Earl H. Brockman, General Manager, Idaho Egg Producers, Clarence Lott, Teamsters Union 983, Howard Hilbun, Field Examiner, National Labor Relations Board, and Thomas P. Graham, Regional Director, National Labor Relations Board. [26]

\* \* \* \* \*

Q. (By Mr. Bruckner): I will direct your attention to October 5, 1953, likewise a Monday, and ask you if you and Mr. Doss returned to the company plant on that date?

A. Yes, we did.

Q. About what time was this, please?

A. We went down about five minutes, five or ten minutes, to 12.

Q. I am sorry. What time was that?

A. About five or ten minutes to 12.

Q. Whereabouts in the plant did you go at that time? A. We went into the office first.

Q. Did you inquire for Mr. Slayden there?

A. Yes.

Q. Whom did you inquire of? [27]

A. The office girl there.

Q. What was her reply?

A. That Mr. Slayden had already left for lunch.

Q. What did you do then?

A. We asked her where the lunchroom was and she told us it was down in the basement.

(Testimony of Clarence Lott.)

Q. Did you tell her who you were?

A. Yes.

Q. What did you tell her?      A. That——

Mr. Eberle (interrupting): How is that material?

Mr. Bruckner: Is there an objection?

Mr. Eberle: Yes, there is. We are just prolonging this record on a lot of these things that are not material. What difference does it make what they said or what she said?

Trial Examiner Bennett: I will take the answer.

A. I told her Mr. Doss and I were from the Teamsters and we would like to see Mr. Slayden and she said he had already left for lunch.

Q. (By Mr. Bruckner): What did you do then?

A. We asked her where the lunchroom was and she told us and we went down there and there were two or three men sitting down on some sacks eating their lunch and we stopped and told them that the consent election agreement had been signed and that probably within the next, in the next trip in, that a Board [28] agent made into the territory, that an election would probably be set up. And then we went on down into the basement.

Q. What time was this that you were in the basement?

A. About four or five minutes after 12.

Q. Were any employees of the company there at that time?      A. Yes.

Q. Do you know who they were?

A. I am not acquainted with the employees

(Testimony of Clarence Lott.)

enough to know them by name, I know some of the employees by name and face, but——

Q. Were they male or female?

A. They were female employees.

Q. Was Mr. Doss with you, sir? A. Yes.

Q. What did you say, if anything, at that time?

A. We went into the lunchroom and told the women the same thing, that we had filed a, had signed a consent agreement and that the Board would probably set up an election the next time they came in. One of the employees that I later found out was Mrs. Monroe said that they had chosen a couple of girls to represent them, to be their spokesmen, not represent them but be their spokesmen, and that they were outside and they thought they ought to be present if there was going to be any discussion take place. One of the other girls left to go out to tell the girls out in the car, too, that they had supposedly selected, who they had selected for a spokesman. And Mrs. [29] Monroe said that she thought they had changed their mind and I asked her what had brought that about——

\* \* \* \* \*

Q. (By Mr. Bruckner): Was anything said about the promise to keep the names of the authorization card signers secret? A. There was.

Mr. Eberle: When was this?

Mr. Bruckner: This was at the same conversation, during the same conversation, at the same time.

A. (Continuing) I don't know the woman, one

(Testimony of Clarence Lott.)

of the women said that we had promised not to divulge the names of the employees that had signed authorizations and Mr. Slayden knew every one of them.

Q. (By Mr. Bruckner): Did you make any reply to that?

A. Yes. I told her that we had not divulged any names and we had kept our promise but we could not stop the employees that were present at the meeting informing Mr. Slayden who was [30] at the meeting and who had signed authorizations, we couldn't stop the employees from talking.

Q. During the course of any part of this conversation did Mr. Slayden arrive?      A. Yes.

Q. Will you tell what occurred when he did arrive, please?

A. Mr. Slayden came down in the basement and he said, "Well, I see you snuck in." And I told him we hadn't snuck in, that we had come down to inform the employees that a consent agreement had been signed and that we had stopped at his office prior to coming down but he had already left for lunch and that—then he said well, he didn't see where the employees needed a bunch of radicals to speak for them and they could speak for themselves. And I told him it didn't look like they could speak for themselves, they wasn't even free enough that they could have a few minutes to discuss their problems without having him present. And the employees began to get up to go to work and so Mr. Doss and myself and Slayden started out.



(Testimony of Clarence Lott.)

Q. Did you have any further conversation with Mr. Slayden after the employees started to go to work?

A. Yes. Up at the top of the stairs.

Q. Who was present at that time, at that point?

A. Doss and myself and Slayden.

Q. Will you relate the conversation as best as you can recall what took place? [31]

A. Mr. Slayden said he didn't need a bunch of Communists to tell him how to come in and run the business and we told him that we weren't Communists, that if he would look into labor organizations he would find that labor organizations had done a great deal to fight Communism, and especially the Teamsters, that our constitution ruled out any memberships of Communists in the organization. He said that I had to have a bodyguard when I come down to the operation, that I couldn't come down by myself, and I told him that he didn't scare anybody, that Mr. Doss was not a bodyguard but a business representative of the Teamsters Union.

Q. Was anything said about an attorney being employed during the course of that conversation?

A. Yes. I told him I understood that his attorney was, had spoken to him about his conduct, and he said, "That is right. The employees have a right to join a union any time they want to."

Q. And what did you say to that?

A. I said, "Don't they have a right not to join

(Testimony of Clarence Lott.)

a union?" And he said, "Yes, they have a right not to join a union if they don't want to."

Q. Was anything else said during that conversation?      A. That is all I can recall.

Q. And, I take it, you and Mr. Doss then left?

A. Yes.

Q. Was that your last visit to the company?

A. Yes.

Q. To your knowledge, was that also Mr. Doss's last visit to the company?      A. Yes.

Q. Did you have any further conversations with Mr. Slayden after that date, either by telephone or anything else?      A. No.

Q. This petition that was filed by you, which is GC-4 in evidence, was assigned the Case Number 13-RC-1391 by the Board. Did you subsequently withdraw that petition, sir?      A. I did.

Q. Was that withdrawal by wire on October 29, 1953?      A. Yes, sir.

Mr. Eberle: October what?

Mr. Bruckner: October 29, 1953, sir.

Q. (By Mr. Bruckner): And the petition for the withdrawal thereof was approved by the Regional Director, as is shown by a letter dated November 2, 1953, that was sent you and the company, is that correct, sir?      A. Yes.

Mr. Bruckner: That was November 2 on that, Mr. Eberle.

Mr. Eberle: November 2?

Mr. Bruckner: Yes, sir.

Q. (By Mr. Bruckner): In your function as

(Testimony of Clarence Lott.)

Secretary Treasurer of the Union, did you have occasion to distribute to certain [33] employees of the company blank authorization cards?

A. Yes.

Q. Did you later receive from these employees or from other employees, in addition to them, authorization cards bearing signatures and dates?

A. Yes.

\* \* \* \* \*

Mr. Bruckner: Will the reporter mark for identification the following documents as General Counsel's Exhibit 7-A, authorization card purporting to bear the signatures of individuals as follows: Thora Panter.

B, Ida Mae Brooks;

C, Carrie Tofanelli;

D, William S. Hoffman;

E, Elizabeth Pharris;

F, Mrs. Evelyn Pharris;

G, Lena Panter. [34]

And as GC-8 for identification:

A, Donna Christenson;

B, Gene Ellsworth;

C, Frances F. Sladek;

D, Velma Armstrong;

E, Erma Herzinger;

F, Janet Stoddard;

G, Ruthe Jensen;

H, Bernard Godfrey;

I, Russell Going.

\* \* \* \* \*

(Testimony of Clarence Lott.)

Q. (By Mr. Bruckner): I will show you what has been marked as 7-A through G, inclusive, and 8-A through I, inclusive, and ask you if these are the cards that you received from the employees.

A. From the employees or——

Q. From certain employees to whom you gave the cards for distribution and solicitation.

A. Yes. \* \* \* \* \* [35]

Q. (By Mr. Bruckner): In addition to the cards that I have just shown you, Mr. Lott, were there any other cards which were given to you which are not included among those which have just been shown you

Mr. Eberle: We object to that as immaterial.

Trial Examiner Bennett: Overruled.

A. Yes.

Q. (By Mr. Bruckner): Do you recall the names of the employees whose signatures were on those cards?

Mr. Eberle: We object to that as being improper evidence.

Trial Examiner Bennett: You are offering this to prove that they signed cards?

Mr. Bruckner: If the court please, I am laying a foundation for introduction to receive into evidence the testimony of this witness under the best evidence rule.

Mr. Eberle: It certainly isn't the best evidence.

Mr. Bruckner: These cards were lost, this man is no longer in possession of these cards.

(Testimony of Clarence Lott.)

Trial Examiner Bennett: These were cards purportedly received from whom?

Mr. Bruckner: May I ask this witness a question?

Trial Examiner Bennett: I will follow this briefly. I am not indicating that I am agreeing with your position. [36]

Mr. Bruckner: I understand that. I am aware that I may be stopped at any time.

Mr. Weston: Did you rule on our objection?

Trial Examiner Bennett: I will give you a running objection. I would like to find out what it is leading up to. Then I will give a ruling.

Mr. Weston: We are objecting to the names.

Mr. Bruckner: I am going to qualify the witness.

Q. (By Mr. Bruckner): From whom did you receive those cards?

A. From Marvin Herzinger and his wife.

Q. Erma Herzinger? A. Yes.

Q. Are those the same Herzingers whose names appear on most of those cards as witnesses?

Mr. Eberle: I didn't think they did.

Mr. Bruckner: Here (indicating).

Q. (By Trial Examiner Bennett): As I understand it, you have received the 16 cards plus several others from Marvin Herzinger. Is that right?

A. Yes.

Q. You didn't see these others signed, the ones that have allegedly been lost? A. No.

Mr. Bruckner: At this time, sir, if the court

(Testimony of Clarence Lott.)

please, I am going to ask the names of these employees. [37]

Trial Examiner Bennett: And you are offering this to show that these employees signed cards?

Mr. Bruckner: Yes, sir.

Mr. Eberle: We object to it as not the best evidence and he is not qualified; no foundation laid.

Mr. Bruckner: I believe that with respect to one aspect of the objection, if I may proceed with two or three more questions——

Trial Examiner Bennett (interrupting): But, in any event, he did not see the cards signed?

Mr. Bruckner: No, sir, he did not.

Trial Examiner Bennett: All he knows is that he got these cards from somebody else?

Mr. Bruckner: Yes, sir.

Trial Examiner Bennett: He got cards purporting to bear certain signatures and thereafter they were lost, is that correct?

Mr. Bruckner: That is correct, sir. As a matter of fact, that will constitute my offer of proof.

Trial Examiner Bennett: If you like, I will treat it as an offer of proof. I am disposed to sustain the objection as to those other cards.

Mr. Bruckner: Very well. And, in addition to what you named, as what I characterized as my offer of proof, I will say that part of my offer of proof will be that if this witness [38] were permitted to answer he would state that he was custodian of the cards and that he made a search for the cards and that the search was not successful.

(Testimony of Clarence Lott.)

Mr. Eberle: The basis of my objection is that he would not be competent to testify as to the circumstances of the signing of the cards.

Mr. Bruckner: Yes, sir. Without going into argument on this, I would like the Trial Examiner to just note that the admission of cards is qualified upon the basis of a witness testifying that he distributed the cards for signature, that they were returned to him by employees of the company, that he was custodian of the cards, that this was his function as an organizer, period.

I take it, that is still your ruling.

Trial Examiner Bennett: I will reaffirm my ruling. I am disposed to require testimony either by the signer of the card or by someone who saw the card signed by the signer.

Mr. Bruckner: Very well. I disagree with that, but I will go along with it.

Trial Examiner Bennett: I don't purport to be infallible but I feel that that is a reasonable method of authentication.

Mr. Bruckner: I agree with the Examiner, sir, but it appears that the Board in several cases has been a bit more liberal with this rule.

I have no further questions at this time. [39]

### Cross Examination

Q. (By Mr. Eberle): Mr. Lott, going back now to the meeting of the 22nd, you said there were 18 present. Can you give me the names of those who were present?           A. No, sir.

(Testimony of Clarence Lott.)

Q. (By Mr. Eberle): Was it a surprise to you, all a surprise to you?

A. No, it wasn't a surprise.

Mr. Bruckner: I will have an objection to that.

A. No, it wasn't a surprise.

Q. (By Mr. Eberle): You had heard about it before?      A. I had heard about it.

Q. You knew that something was going on?

A. I was directing it, but that doesn't say I have to direct it with the employees.

Q. Through whom were you directing them?

A. Through the business agent, Mr. Doss, Dewey Doss.

Q. And that was the only one?

A. No. I had had some conversations with Marvin Herzinger.

Q. Through Mr. Doss and then also through Mr. Herzinger?      A. Yes.

Q. Mr. Herzinger is not an employee, is he?

A. No. [42]

Q. He does work for you in organizing, that is, for the Local 983?

A. He is the steward; in fact, all of our members does organizing at times.

Q. I see. But you were operating through Mr. Doss and Mr. Herzinger?      A. Yes.

Q. And then he took it from there on?

A. I don't know what you mean by "took it from there on".

Q. I notice his name on some of these cards. So he went ahead and did the organizing then?



(Testimony of Clarence Lott.)

A. Mr. Herzinger?

Q. Yes.

A. You have reference to Mr. Herzinger?

Q. Yes.

A. He did some of it, yes.

Q. Who else did it, that you know of?

A. I don't inquire as to all of the ratifications, who is doing it, and——

Q. Let's get to this. You were doing the organization through Mr. Doss and Mr. Herzinger?

A. Yes.

Q. But not through Mrs. Herzinger? A. No.

Q. At this meeting, you said, there were a number of questions [43] asked. By whom were these questions asked?

A. Well, we don't pinpoint, in a meeting, as to who asks the questions and which one asked the questions. We never do.

Q. You just don't know? You know there were some questions asked and that is all?

A. Well, Mr. Hoffman asked a good many of the questions, and Mr. Godfrey—there was people that asked questions that I don't know.

Trial Examiner Bennett: You have answered the question.

Q. (By Mr. Eberle): The eighteen that were present, you counted eighteen at that meeting?

A. Yes.

Q. And were they all employees?

A. There was 18 employees; there was more in the meeting than 18.

(Testimony of Clarence Lott.)

Q. Then you want to correct your answer; there were more than 18 in the meeting?

A. There was 18 employees, as we have testified.

Q. If you will just answer the question, you see, we will get along quicker. I asked you how many were at the meeting?

A. You mean how many people were at the meeting?

Q. That is, ordinarily, how many people would be there, certainly.      A. I think it was 22.

Q. Who were the four that were not employees?

A. Myself, Dewey Doss, Marvin Herzinger and Sladek.

Trial Examiner Bennett: Who is he?

The Witness: He is a member of the Teamsters Local 983.

Q. (By Mr. Eberle): Is he the husband of one of the employees?      A. Yes.

Q. And Herzinger is the husband of another employee?      A. Yes.

Q. You have given us all of the conversations, correspondence and communications between you or the union and Mr. Slayden?

A. All that I can recall.

Q. You don't know of any others that you haven't testified to?      A. Any other—

Q. Well, the question was conversations, letters, correspondence or any other memorandum between you and the Egg Producers as far as Slayden is concerned.

A. No, I can't recall any, not at this time. You

(Testimony of Clarence Lott.)

have reference to the dates, or as to conversations?

Mr. Eberle: Well, I thought my question was clear.

Trial Examiner Bennett: He just asked whether you recall any other letters or talks other than the ones you have told us about.

The Witness: Well, I can't recall any with Mr. Slayden other than the ones I have testified to.

Q. (By Mr. Eberle): Or any other correspondence other than that in evidence here? [45]

A. No.

Q: You don't know who the office girl was, you don't know her name or anything?

A. I believe it is Mrs. Calloway.

Q. Calloway? A. Yes.

Q. Have you any knowledge as to whether any car was used, any company car was used?

A. Not to my knowledge, I don't know of any.

Q. After Mr. Slayden had expressed these various opinions which you have testified to, I understood, I understand you said that he told you that after all, every member, every employee had a right to either join the union or not join the union?

A. I think he made that statement.

Q. Now, this conversation about his wanting to be present, that pertained to your having a meeting with the employees on the premises?

A. There was no designation as "on the premises" but it was understood that we wanted to speak to them in the lunch period, in the lunch room.

(Testimony of Clarence Lott.)

Q. He had no objection to your various organizers anyplace else?

A. He told use he didn't want us talking to the employees, and he didn't say on the company premises or anything else. [46]

Q. You understood that?

A. It was assumed because we were discussing about the lunch room.

Q. As a matter of fact, hadn't he told you when you first went there that if you had any meetings on the premises he wanted to be there?

A. He told me if I talked to the employees at any time——

Q. On the premises?

A. Well, he didn't say "the premises", "if you are talking to the employees I want to be present". It was understood because we were discussing the company——

Trial Examiner Bennett (interrupting): I think you and the witness are in agreement on the point.

Mr. Eberle: Yes.

Q. (By Mr. Eberle): On the 5th of October, I think, about 5 minutes after 12, you went by and saw two or three men sitting on some sacks. Who were they?

A. I couldn't tell you. Mr. Godfrey was the only one there that I was personally acquainted with.

Q. But you don't know the others?

A. Well, the foreman——

Q. Talbot?

(Testimony of Clarence Lott.)

A. Talbot, I understood, was one of the men, but I had never met him.

Q. You had never met him. And then you said you went down to [47] lunchroom and you said there were several women there. Now, who were they? A. I don't know.

Q. How many were there?

A. I never counted them.

Q. You said at that meeting some of the women said that you had promised not to divulge the names. Is that correct?

A. That statement was made in the lunchroom there, yes.

Q. Yes, in the lunchroom. Well, did you know whether someone had?

Mr. Bruckner: I am sorry, sir. I don't understand.

Mr. Eberle: Someone had divulged the names.

A. Well——

Q. (By Mr. Eberle—interrupting): Do you know?

A. Well, only from what the employees told me, that they had divulged, that the names had been divulged to Slayden.

Q. Did they have some feeling about that?

A. Yes.

Q. Did they tell you that had anything to do with their changing their mind about the union?

A. Yes. It had placed a fear of discharge among them.

Q. Who made that statement?

(Testimony of Clarence Lott.)

A. The woman who raised the question about the cards.

Q. That was Mrs. Monroe?

A. No. Mrs. Monroe was not the woman who raised the question [48] about the cards.

Q. Yes. Yes, yes, you said Mrs. Monroe told you that, I thought she was the one who said, that raised the——

A. No, Mrs. Monroe was the woman who raised the question about having, that there was two other women that had been selected as spokesmen.

Q. I see. So Mrs. Monroe—well, who told you about the fact that they had known about someone telling the employer?

A. I don't know the woman's name.

Q. You don't know who she was?

A. No.

Q. What did she look like?

A. She was an elderly lady, I would say about 55, between 55 and 60.

Q. Dark-complected?                      A. Gray hair.

Q. She is the one who made that statement to you?                      A. Yes.

Q. Who handed these cards to you?

A. Marvin Herzinger handed the cards to me.

Q. And at the time that you received them they were in the same condition as they now are?

A. No. They weren't stapled together.

Q. Well, I mean, the cards themselves had the same printing and writing on them at the time you received them that they [49] now have?

(Testimony of Clarence Lott.)

A. That is right.

Q. That last time that you went down to the lunchroom, Mr. Lott, I believe you said that you went down to tell the employees that the company had consented to an election?

A. That is correct.

Q. And that was important, for them to know that?

A. We had promised the employees we would keep them posted on the progress——

Q. (Interrupting) You had also told them there would be an election?           A. No.

Q. You hadn't told them?

A. No. I told them we would file a petition for an election, the company had a right—I explained that the company could deal with the union direct on the presentation of evidence or they could request an election, refuse to——

Q. And what was the purpose of going down there?

A. Was to tell them that we had signed the consent election agreement. [50]

\* \* \* \* \*

### DEWEY DOSS

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

#### Direct Examination

Q. (By Mr. Bruckner): Your name and address, please.

(Testimony of Dewey Doss.)

A. Dewey Doss, 127 Berryman Road, Pocatello, Idaho.

Q. You are the same Dewey Doss who was referred to in the previous testimony by Mr. Lott?

A. Yes, sir.

Q. You were present here in the courtroom during Mr. Lott's testimony, weren't you, sir?

A. Yes, sir.

Q. You overheard the questions and answers at that time?

A. Yes, sir.

Q. And your status is Business Agent of Teamsters 983?

A. Yes, sir.

Q. How long have you had that job?

A. Since December 5, 1949.

Q. I will ask you your opinion with respect to the accuracy of Mr. Lott's testimony, such testimony which goes to any incidents or conversations at which you were present—— [51]

Mr. Eberle: We object to his opinion as being immaterial.

Mr. Bruckner: Very well. Then we will go through the entire thing.

Q. (By Mr. Bruckner): Mr. Doss, did you attend a meeting of the employees on September 22, 1953, at the Labor Temple?

A. Yes, sir, I did.

Q. Can you state how many employees, if you know, of Idaho Egg Producers were present at that time?

A. Eighteen.

Q. How do you know there were 18 there?

A. I counted them.



(Testimony of Dewey Doss.)

Q. To your knowledge, were any supervisors of the company present?      A. No.

Q. Do you know the supervisors of the company?      A. No.

Q. Did you have occasion to meet Mr. Talbot?  
A. No.

Q. Can you briefly tell us——  
Mr. Bruckner: Strike that.

Q. (By Mr. Bruckner): Did anybody chair at that meeting?

A. Mr. Marvin Herzinger was chairman at the meeting, yes, sir.

Q. Did Mr. Lott speak?      A. Yes, sir.

Q. Did you speak?      A. Yes, sir.

\* \* \* \* \*

Q. (By Mr. Bruckner): Was anything said about the purpose of the meeting?

A. Yes, sir.

Q. By whom?      A. By myself.

Q. What did you say?

A. I introduced myself as being a representative of the Teamsters Union and due to the fact that Mr. Herzinger was more or less helping us in the organizational procedures of the company employees I felt that he should be the chairman of the meeting, [53] which he consented to do. At that time I turned the chair over to Mr. Herzinger.

Q. Was anything said about the procedure to be followed with respect to negotiating or bargaining with the company? \* \* \* \* \*

(Testimony of Dewey Doss.)

A. Mr. Lott explained the procedure.

Q. What did he say?

A. He explained to the employees pretty much as he has already testified here, that the company had a perfect right, under the National Labor Relations Act that the company could force the union to a representation election; if they did not, we could deal directly with the company without the election.

Q. Was anything said about the purpose of the authorization cards that were signed?

A. Yes, there was.

Q. By whom?

A. By myself and Mr. Lott.

Q. What did you and Mr. Lott say about that?

A. We explained to the employees that it was necessary to [54] have a majority of the employees sign those authorization cards before the Board would recognize us as being a bargaining union for the employees.

Q. Was anything said about what procedure you would follow with respect to filing a petition and request for bargaining with the company?

A. There was.

Q. By whom?                      A. Mr. Lott.

\* \* \* \* \*

Mr. Eberle: We object to the hearsay testimony of what other people said at these meetings. We can't be bound by statements that were heard by this man, that this man heard made by others. How can we be bound by that?

(Testimony of Dewey Doss.)

Trial Examiner Bennett: The record indicates that the statements were not made in the presence of a representative of management, or of the Respondent. On the other hand, I think it is competent to illustrate the union organizational activities.

\* \* \* \* \* [55]

Q. (By Mr. Bruckner): Was anything said during that meeting about disclosing the names of signers of authorization cards? A. Yes.

Q. By whom? A. Mr. Lott.

Q. What did he say about that?

A. He explained that the company would not be given the names of the employees who attended the meeting or the employees who signed the authorization cards, that they would go directly with the other necessary papers to the Board.

Q. Directing your attention to September 28, Monday, you accompanied Mr. Lott to the company premises? A. Yes, sir.

Q. And at the company premises you had a conversation with Mr. Slayden, sir? A. Yes, sir.

Q. And, between you and Mr. Lott, who did most of the talking for the Union?

A. Mr. Lott was spokesman for the Union.

Q. Do you recall what was said at that time, sir? [56] A. Part of it, yes.

Q. Will you state to the best of your recollection what was said and who said it? First of all, were any other witnesses present? A. No.

Q. Now answer the previous question if you will.

(Testimony of Dewey Doss.)

A. As Mr. Lott has already stated, we went to the company premises in the morning and Mr. Slayden was out. We checked at the office and the lady told us that he was out, he had gone to town and he would be back later. We explained to her who we were and we would be back later in the day.

Q. In any case, you did come back and talk to Mr. Slayden?

A. Yes, before noon of that same day.

Q. Will you tell us what Mr. Slayden said and what Mr. Lott and you said, if anything?

A. We introduced ourselves as being representatives, Business Representative and Secretary, of the Teamsters Union and that a majority of the employees had signed authorization slips for representation. One of the statements of Mr. Slayden was that he didn't like the way we had come in the back door to stir up his employees. Mr. Lott assured him that neither he nor myself had ever been in the operation, that the employees had come to us themselves for representation and, as Business Representative and Secretary for the Teamsters Union, that was part of our duties, to represent those employees who sought [57] organization.

Q. Do you recall whether anything was said during that conversation about a meeting of employees on company time which had been held on Saturday, the 26th of September?

A. Mr. Lott says to Mr. Slayden, "I understand you have been threatening the employees and you also have had a meeting of the employees on com-

(Testimony of Dewey Doss.)

pany time and have offered to furnish them transportation to go over to the union and withdraw their names from the union." And he said, "That is right. I will have a meeting of my employees anytime, anywhere I so desire, whether it is on company time or not."

Q. Was anything said during the course of that conversation about machinery that could be installed to replace the employees?

A. Mr. Lott asked him the question if he had threatened the employees with installing machinery if they went union and he said yes, he had told the employees that he could install machinery that would eliminate a lot of the jobs, that the plans were in his safe at the present time and all that he had to do was to give his go-ahead on the plans to have the machinery installed. [58]

\* \* \* \* \*

Q. (By Mr. Bruckner): Did Mr. Slayden say anything about whether it was necessary to tell the employees that the machinery would be put in whether the union came in or not?

A. He said that he didn't feel that it was any of the employees' business to know whether or not machinery would be put in.

Mr. Bruckner: Would you repeat that?

(Last question and answer read.)

The Witness: I would like to correct that. He said that he didn't feel it was necessary to tell the employees.

(Testimony of Dewey Doss.)

Q. (By Mr. Bruckner): Necessary to tell them what, sir?

A. That the machinery would be put in——

Q. Go ahead.

A. Whether the union came in or not.

Q. I see. That is your complete answer?

A. Yes.

Q. Was any request made by Mr. Lott to speak to the employees on their lunch hour?

A. Yes, there was.

Q. Can you recall what Mr. Lott said with respect to that?

A. Mr. Lott requested of Mr. Slayden the opportunity to [59] talk to the employees during their lunch period. Mr. Slayden said, "Provided I am present, you can talk to them."

Q. What did Mr. Lott reply, if anything?

A. Mr. Lott said, made the statement that "Do you mean to say that if we talk to the employees on lunch time, that you intend to be present?" and Mr. Slayden said, "That is right. I intend to be present anytime you talk to the employees."

Q. Did you return to the plant on Monday, October 5, 1953, in company with Mr. Lott?

A. Yes, sir.

Q. Did you speak to Mr. Slayden at that time?

A. Mr. Slayden had already gone to lunch.

Q. I see, sir. When did you and Mr. Lott arrive at the company plant?

A. I would say 10 minutes before the lunch hour of 12 o'clock.

(Testimony of Dewey Doss.)

Q. And how did you know whether Slayden had gone to lunch?

A. We checked at his office first, with his office, and his office girl told us he had left early.

Q. And, I take it, you then went down to the lunchroom, to the basement, to speak to the employees in the lunchroom? A. We did.

Q. Do you know any of the employees who were present at that time?

A. Not personally I don't.

Q. About how many were present, sir? [60]

A. About 7 or 8, I would say.

Q. Were they male or female?

A. Female.

Q. Were they all female? A. Yes.

Q. During that conversation with those employees, until such time as Mr. Slayden arrived, was anything said by any of the employees, or by anybody, about having been promised part of what they wanted? A. Yes.

Mr. Eberle: Who said this, now?

Mr. Bruckner: I am just asking if this was said. I am not going into who said it, sir.

Q. (By Mr. Bruckner): Who said it and what was said?

A. The lady that Mr. Lott described in his testimony.

Q. What was her name, if you know?

A. Mrs. Carrie Monroe, I believe, sir.

Q. What was it that she said?

A. She said that the two people that they had

(Testimony of Dewey Doss.)

chosen as spokesmen were not present and they felt they should be in on the discussion if any union activities were going to be discussed during the lunch hour. And immediately one of the ladies in the room left to go call the other ladies in. And in the meantime Mrs. Monroe said that the company——

Mr. Eberle (interrupting): We object to any statement [61] Mrs. Monroe made at that time.

Trial Examiner Bennett: For what purpose are you offering it?

Mr. Bruckner: If the Examiner please, I think this is important, to show the attitude of the employees, the reception accorded to union representatives by employees who had signed cards, the atmosphere which pervaded the company at that time.

Trial Examiner Bennett: If you are offering it to show what the employees said, I suppose it is competent, but I don't think it is competent to prove what was said to the employees by management.

Mr. Bruckner: Yes, sir, I understand that. This is hearsay with respect to whether the acts which the employees maintain were done were in fact done.

Trial Examiner Bennett: I see.

Mr. Bruckner: I am not offering it for that purpose.

Trial Examiner Bennett: I will let you offer it



(Testimony of Dewey Doss.)

for the other purpose. I am not indicating how material it is, or what weight I will give it.

Mr. Bruckner: Yes, sir.

Trial Examiner Bennett: I will overrule the objection on that basis.

Q. (By Mr. Bruckner): Will you continue with your answer.

A. Mrs. Monroe said that management had already promised them part of what they wanted in the first place and that was Saturdays [62] off. And she also accused us of divulging the names of all those who had signed the authorization cards and who had attended the meeting. We assured her that we had not at any time divulged the names of the employees who had attended the meetings or who had signed, the employees who had signed authorization cards, but at the same time we weren't able to keep the employees themselves from talking to management as to who was in attendance at the meeting.

Q. Did Mr. Slayden arrive during the course of this?

A. Yes, sir.

Q. What was his statement at the time he arrived?

A. His statement before he even got to the lunchroom was "I see you snuck in."

Q. Did anybody reply to that?

A. Mr. Lott says, "We did not sneak in. We applied at your office before coming down and we

(Testimony of Dewey Doss.)

were informed that you had left for lunch early."

Q. What did Mr. Slayden say then?

A. He said, "I don't think that the employees need a union to represent them. They can speak for themselves." [63]

\* \* \* \* \*

Q. (By Mr. Bruckner): Can you relate what that conversation was at that time?

Trial Examiner Bennett: In addition to what you have already told us.

A. That was pretty much the end of the conversation as far as the meeting in the basement was concerned, because when Mr. Slayden came into the lunchroom it wasn't time to go back to work yet, but the employees jumped up and started back to work even before it was time to, the regular time to go back to work. When the employees left there was no reason we should stay down in the basement, so we started back up the stairs. Mr. Slayden told us, when we got to the top of the stairs Mr. Slayden said that he didn't feel that it was necessary for a [64] bunch of Communists to come in and represent his employees. Mr. Lott replied by saying, "We are not a bunch of Communists and if you knew anything about labor organizations you would know as a general rule they fight Communism, especially the Teamsters Union." He said, "I understand that your attorney has been down and talked to you, but he doesn't seem to have you straightened out as to what you are doing." And he said, "Oh, yes, he has. The em-

(Testimony of Dewey Doss.)

ployees can join a union if they want to." And he said, "If I have violated any laws, go ahead and have me thrown in jail." And he said, "Well, you know that we can't have you thrown——

Q. (By Mr. Bruckner): Who said what?

A. Mr. Slayden said that, and he said, "We can't have you thrown in jail for talking to your employees"——

Trial Examiner Bennett: I don't see where this exchange of mutual admiration contributes anything to the record.

Mr. Bruckner: Let's just clarify who said what in that.

Q. (By Mr. Bruckner): Was it Mr. Slayden who said, "Throw me in jail", or words to that effect?

A. Mr. Slayden said, "If I have violated any laws, go ahead and have me thrown in jail."

Q. And it was Mr. Lott who replied that——

A. Yes.

Q. Very well. Was that the last time you spoke to Mr. Slayden? [65]           A. It was.

Mr. Bruckner: Nothing further.

### Cross Examination

Q. (By Mr. Eberle): You understood from Mr. Slayden at the time prior to this last meeting there that he didn't want you to have a meeting on the premises without his being present, didn't you?

A. Yes, sir.

Q. He made it pretty clear, didn't he?

(Testimony of Dewey Doss.)

A. Yes, sir.

Q. He said—and when he saw you got in there without his being present he was quite annoyed?

A. He seemed to be. \* \* \* \* \*

Q. (By Mr. Eberle): Didn't you know he wanted to be there when you came in?

Trial Examiner Bennett: You may answer that.

A. That was his request at our meeting on September 28. [66]

\* \* \* \* \*

Q. (By Mr. Eberle): On this question of machinery, you said that you told him you had heard, or Mr. Lott had heard, that he used this in connection with the employees. Mr. Slayden told you that it was just a question of economics, they had planned on machinery for a long time, didn't he?

A. He hadn't told the employees—

Q. (Interrupting) I am asking you what he was telling you.

A. He didn't say that they had planned on machinery for any definite period of time.

Q. But it was a question of economics, wasn't it, it was cheaper to use machinery than labor, didn't he say?      A. Possibly.

Q. (By Trial Examiner Bennett): You mean, you are not sure or what?

A. I am not sure.

Q. (By Mr. Eberle): He told you he had had the plans for sometime, didn't he?

A. He said the plans were in his safe.

Q. Yes, that is right. There was nothing—now,

(Testimony of Dewey Doss.)

Mr. Lott said that you were doing the organizing. When did you first talk to the employees about this matter?      A. At different times.

Q. Well, when?

A. Two months previous to the meeting on September 22.

Q. Whom did you contact then? [67]

A. For one person in particular, Mr. Bernard Godfrey. He happens to be my next-door neighbor.

Q. And who else?

A. By telephone, Mr. Gene Ellsworth.

Q. Who else?

A. And with Russell Going, who happens to be an ex-member of our organization, who formerly worked for the Kraft Foods Company.

Q. And then who else did you have to go ahead and organize them?

A. Our job steward, Mr. Marvin Herzinger.

Q. And his wife?      A. Yes.

Q. I say, Herzinger and his wife, they were the organizers?      A. Yes.

Q. Were you present at the time that any of these cards were signed?      A. Yes, I was.

Q. Just tell us which ones you were present at.

A. I don't recall which ones were signed at the time, but some of them were signed in the meeting. I mean, after the meeting, on September 22.

Q. But you don't know which ones they were?

A. No.

Trial Examiner Bennett: What do you mean, "after the [68] meeting"?

(Testimony of Dewey Doss.)

The Witness: After the meeting was regularly adjourned.

Trial Examiner Bennett: On the same date?

The Witness: On the same date.

Trial Examiner Bennett: Next question.

Q. (By Mr. Eberle): You knew that the employees wanted to get out of the union there, they wanted to withdraw there, these cards they signed and so forth?

Mr. Bruckner: Objection.

Trial Examiner Bennett: You may answer, based upon what they told you.

A. No, I didn't, because I wasn't home when the individual called, who also called Mr. Lott.

Q. (By Mr. Eberle): But you knew about it?

A. Not until he had told me.

Q. When did he tell you?

A. Monday morning.

Q. Monday morning?      A. Yes.

Q. So practically all these things that you and Mr. Lott have been testifying about have been after you knew that they wanted to get out of the union?

A. Not necessarily.

Q. Well, Saturday was the 26th, wasn't it?

A. Yes. [69]

Q. Wasn't that the day they wanted to get out?

A. Yes.

Q. And these conversations of the 28th and so on were all after that time?

A. (No response.)

Q. Do you know what Mr. Lott told them when

(Testimony of Dewey Doss.)

they wanted to get out?           A. No, I don't.

Q. You don't know anything about those things, he didn't tell you, he didn't mention it to you at all?

A. As a general rule, we don't work on Sunday. A lot of times we do, but that was one of the Sundays we didn't work.

Q. But the 26th was Saturday. You knew about this free transportation. What was that in connection with?

A. That was in connection with the telephone call made to Mr. Lott.

Q. So you do know about it, so you knew about it?

A. I don't know about it. Mr. Lott testified about it.

Q. You were saying a lot of things Mr. Lott told you, what he said, and he told you they wanted to get out on the 26th, didn't he?           A. Yes.

Q. So you knew about it at that time, before these following meetings you had on Monday and Tuesday and so on?

A. He didn't tell me on the 26th because I didn't see him [70] then——

Q. On Monday morning, then?

A. The same time we had the talk with Mr. Slayden, yes.

\* \* \* \* \*

Q. (By Mr. Eberle): Before the meeting you had at noon, then, Mr. Doss, you knew all about that?           A. Yes.

(Testimony of Dewey Doss.)

Mr. Eberle: That is all.

### Redirect Examination

Q. (By Mr. Bruckner): You, Mr. Doss, agreed that Mr. Slayden appeared to be annoyed when you saw him on your second occasion, which was October 5, is that correct, sir?

A. Yes, sir.

Q. Was he annoyed at the time you saw him the first time, on September 8? What was his attitude then?

A. Well, a little bit antagonistic.

Mr. Bruckner: Nothing further.

### Recross Examination

Q. (By Mr. Eberle): After these conversations with Mr. Slayden [71] to whom did you make any statement about what he told you, outside of what you have made the statement here?

\* \* \* \* \*

Trial Examiner Bennett: If I follow the question, you are asked if you discussed this talk with anyone else, that you had with Slayden, at any other time.

Is that your question?

Mr. Eberle: Yes.

A. With Mr. Godfrey and with Mr. Herzinger.

Q. (By Mr. Eberle): Those are the only two?

A. As I recall. \* \* \* \* \* [72]



CLARENCE LOTT

a witness recalled by and on behalf of the General Counsel, having been previously sworn, was examined and testified as follows:

Further Direct Examination

Q. (By Mr. Bruckner): You understand, do you, Mr. Lott, that you are still under oath?

A. Yes.

Q. Mr. Lott, directing your attention to September 26, which was a Saturday, I will ask you, sir, if you recall receiving a telephone call from a person who held herself out to be an employee of the company on that day.

A. Yes, I did.

Q. At what time of the day was this, about?

A. Well, I can't recall just exactly the time of day. It was about the middle of the day. I was doing some work there at home and I was called, and——

Q. Do you recall if the person who made the call introduced herself by name?

A. No, I can't recall whether she—— [74]

\* \* \* \* \*

A. (Continuing) I can't recall whether or not she identified herself by name over the phone, but I later found out who it was.

Q. Will you repeat the conversation as best as you can recall it, please?

A. I was called to the phone and the party said they were an employee of the Idaho Egg Producers and they wanted to know if they could withdraw from the union, how they would go about with-

(Testimony of Clarence Lott.)

drawing from the union, and I explained to her that she did not belong to the union. I explained that the cards that they had signed was authorization authorizing the local union to bargain for them but it wasn't a membership in the union.

Q. Do you recall anything else that was said during that conversation?

A. Well, she asked about the cards, if they could have their cards back, and I told her that they had been forwarded on to the Board, which was true; the next day, on the 23rd, when we had filed the election, for the election, the cards had been forwarded to the Board and it was in the hands of the Board.

Q. Do you recall whether anything else was said during that phone conversation or is that about it?

A. No, I don't recall, that is the best I can recall of it, that is what I recall. [75]

#### Further Cross Examination

Q. (By Mr. Eberle): You told her it would have to wait to go to an election, didn't you?

A. No. I don't recall. She asked about the cards and I told her they were with the Board, they had been filed with the petition for an election, those cards had to go forward with the petition and the petition had been filed.

Q. You said it would have to go to an election, is what you said to her?

A. I told her I didn't have the cards. I don't recall mentioning the election. I told her that the

(Testimony of Clarence Lott.)

cards had gone with the petition for an election, therefore that we couldn't—

Q. Then, these cards that you mentioned this morning were not in your possession ever since they were delivered to you?

A. No. They are filed as evidence. Some of them were filed as evidence with the Board, with the petition for election.

Q. I asked you this morning, you know, whether they were still in the same condition as when you received them.

A. You asked whether they were in the same condition. They are in the same condition, but you never asked me if—

Trial Examiner Bennett (interrupting): You have answered the question.

Q. (By Mr. Eberle): So then you knew on Monday, September 28, that these employees wanted to withdraw?

A. When you say "these employees", there was only one employee [76] that had called.

Q. She didn't say anything about anybody else?

A. She said there was one or two other employees with her that would like to—

Q. She said just one or two, is that right?

A. Yes.

Q. Who, did you find out later, it was?

A. Carrie Monroe.

Q. You received this letter saying that, from Mr. Slayden, saying that the matter had been turned over to the home office at Caldwell?

(Testimony of Clarence Lott.)

A. Yes.

Q. But you continued to talk to him there at his office?

A. I continued? What do you mean, I continued?

Q. Well, you went back and talked—these conversations you were talking about were after that letter, weren't they?

A. Well, the one was on the same day that we received the letter from Mr. Slayden. And the letter was not clear as to whether or not all absolute business would be done by the Caldwell office or not, absolutely all business.

Q. Did you ever contact the Caldwell office?

A. No. I had no occasion to.

Q. The letter that you refer to as not being clear is the one that has been offered here as Exhibit 5, is that correct?

A. Yes, but it doesn't state in that letter—

Q. (Interrupting) Just answer the question. I just asked you if it was.      A. Yes.

Q. (By Trial Examiner Bennett): How far is Caldwell from Pocatello, if you know?

A. Approximately 200 miles.

Mr. Eberle: That is all.

#### Redirect Examination

Q. (By Mr. Bruckner): Do you recall what your purpose was in making the visit to the plant on September 28, speaking to Mr. Slayden?

(Testimony of Clarence Lott.)

Mr. Eberle: We object to his stating what his purpose was. And also it is repetition.

Mr. Bruckner: If the court please, I should like to be able to pursue this line in order to show that there was a direct course of relationship between the events of September 26 and the visit of September 28, in addition to that already testified to.

Trial Examiner Bennett: I will take the answer.

The Witness: Will you read the question, please?

(Last question read.)

A. Yes. [78]

\* \* \* \* \*

Q. (By Mr. Bruckner): What was the purpose of the visit on September 28?

\* \* \* \* \*

A. The purpose of that meeting was to make a request on the company to bargain and to investigate whether or not the things that we were being told, that we had been told, by the employees were true or not, that Mr. Slayden was making threats.

Mr. Eberle: We object to that again and move to strike it now on the grounds it is not pertinent, material or within the issues, and improper examination at this time.

Trial Examiner Bennett: I will permit the answer to stand. I am more concerned, however, with what he said, if anything, on the indicated occasion.

\* \* \* \* \* [79]

MARVIN A. HERZINGER

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Bruckner): State your name and address, please.

A. Marvin A. Herzinger, 3824 Jason Avenue, Pocatello. Idaho.

Q. Where are you employed?

A. Challenge Creamery and Butter Association.

Q. Are you a union steward at that plant?

A. Right.

Q. For which union, sir?      A. Teamsters.

Q. Teamsters 983?      A. Yes.

Q. Speak up, will you.

A. Well, Teamsters local here.

Q. Did you attend the meeting of employees of Idaho Egg Company, or Idaho Egg Producers, at the Labor Temple on September 22, 1953?

A. Yes.

Q. Do you recall who chaired that meeting?

A. I did.

Q. Did you, on September 21 and September 22, have occasion to visit various employees and secure from them authorization [80] cards containing their signatures?      A. I did.

Q. I will show you, Mr. Witness, a document marked GC-7-A for identification and ask you if that bears your signature?

A. That is my signature.

(Testimony of Marvin A. Herzinger.)

Q. And was that signature made by you on that card on or about the date shown thereon?

A. On the date shown there.

Trial Examiner Bennett: You are referring to the——

Mr. Bruckner: To his own signature.

Trial Examiner Bennett: Opposite the term "Witness"?

Mr. Bruckner: Yes, sir, opposite the term "Witness".

Q. (By Mr. Bruckner): Above the term "Witness" there is a line which bears the title "Signed". What is the name on that line?

A. Thora Panter.

Q. Was that signature put on that authorization card in your presence? A. That is right.

Q. And upon the date shown thereon?

A. That is right.

Mr. Eberle: Would you mind asking if he knew her?

Mr. Bruckner: Yes, sir.

Q. (By Mr. Bruckner): How did you know that this was Thora Panter? [81]

A. She was introduced to me.

Q. By whom?

A. Either my wife or Mrs. Jensen.

Q. At this point let me ask you this, your wife is who, sir? A. Erma Herzinger.

Q. She is an employee of the Idaho Egg Producers? A. Yes.

Q. I will show you 7-B for identification——

(Testimony of Marvin A. Herzinger.)

Mr. Bruckner: Strike that.

Q. (By Mr. Bruckner): No. 7-C for identification, I will ask you if that is your signature opposite the title "Witness".      A. Yes.

Q. Was that affixed on the date shown thereon?

A. As close as I can remember, all these were signed, completely filled out at the time the signatures were signed.

Q. This bears the signature "Carrie Tofanelli" opposite the word "Signed", is that correct?

A. Correct.

Q. Was that signature affixed to that document in your presence?      A. Yes.

Q. How did you know that this was Carrie Tofanelli?

A. She, again, was introduced to me by my wife or Mrs. Jensen.

Q. I will now show you 7-D for identification and ask you if that is your signature. [82]

A. That is my signature.

Q. Affixed on the date shown thereon?

A. That is correct.

Q. There is a purported signature of one William S. Hoffman opposite the word "Signed". Was that signature affixed to that document in your presence?      A. Correct.

Q. Were you introduced to this gentleman?

A. I was.

Q. By whom, sir?

A. Either my wife or Mrs. Jensen.



(Testimony of Marvin A. Herzinger.)

Q. (By Trial Examiner Bennett): Did you know any of them personally?

A. Thora Panter, I knew who she was. As far as knowing any of them intimately or anything like that, I didn't, the ones I have gone through so far.

Q. (By Mr. Bruckner): As I understand your previous testimony, all of these cards were filled out completely on the date shown thereon.

A. Correct.

Q. I will show you 7-E for identification and ask you if that is your signature affixed on the date shown? A. Yes.

Q. And that bears the signature of one Elizabeth Pharris. Were you introduced to her? [83]

A. Yes.

Q. By your wife or Mrs. Jensen, I take it?

A. I had known her previously.

Q. Was that signature affixed in your presence on the date shown? A. Correct.

Q. (By Trial Examiner Bennett): Was your wife present at this time, too, and Mrs. Jensen as well?

A. They were present with me during all of the signing of these cards, during the signing of all of them.

Q. (By Mr. Bruckner): I will show you 8-E for identification——

Mr. Bruckner: We will skip 8-E for a bit. That is Erma Herzinger's and she is going to testify.

Q. (By Mr. Bruckner): No. 8-H for identification. I will ask you if that bears your signature.

(Testimony of Marvin A. Herzinger.)

A. Correct.

Q. And there is the signature of one Bernard Godfrey opposite the word "Signed". Do you know Bernard Godfrey?      A. I know him.

Q. Did you know him prior to September 21?

A. I knew him prior to that date, correct.

Q. Was that signature affixed to that card on that date, sir?      A. Yes.

Q. (By Trial Examiner Bennett): By that, I suppose you mean, you saw him sign it? [84]

A. That is correct.

Q. (By Mr. Bruckner): Directing your attention to 8-I, does that show your signature?

A. Correct.

Q. On the date shown?      A. Yes.

Q. Did you know Russell Going?

A. Yes.

Q. Did you know him prior to that date?

A. No.

Q. Were you introduced to him on that date?

A. Yes.

Q. By whom?

A. Either my wife or Mrs' Jensen.

Q. Was that signature affixed to that document by Russell Going and witnessed at that time by you, sir?      A. Correct.

Mr. Bruckner: I now offer 7-A, C, D, E, and 8-H and 8-I in evidence.

Mr. Eberle: May I ask a question in aid of a possible objection?

Trial Examiner Bennett: Certainly.

(Testimony of **Marvin A. Herzinger**.)

Q. (By Mr. Eberle): Mr. Herzinger, did you ask any of these people that purported to sign these cards to sign them?

A. Well, I explained to them what the situation was on the [85] cards prior to having them sign them.

Q. And who filled in these dates on here?

A. Those dates were mostly filled in by themselves on the cards that I signed.

Q. (By Trial Examiner Bennett): You say, the dates were filled in by you or by the signer? I didn't get that.

A. Well, some of them may have been filled by, filled in by, the signer, and if they didn't fill it in I filled it in. Now, that I don't completely recall.

Q. (By Mr. Eberle): Well, would you fill in both dates?      A. Pardon?

Q. Would you fill in both dates?

A. Well, if they didn't fill it in I filled it in. The main part of it was the signature. At the time they were completed I filled them in.

Q. Well, in other words, on these cards it would either be the handwriting of the person purporting to have signed them or your handwriting?

A. As close as I can remember, all of them were either in my handwriting or the handwriting of the person that signed them.

Q. Would there have been some other third person who would have put some of the writing on there, too?

(Testimony of Marvin A. Herzinger.)

A. My wife may have dated some of them, due to the fact that I gave her the tickets to hold.

Q. You mean after they were signed? [86]

A. She held them after they were signed.

Q. And she might have dated them then?

A. Well, if it was—it was dated at the time, due to the fact that all of the cards were completely filled in at the time.

Q. I asked you whether you and the person who signed them were the only ones who filled them in at that time. Do you mean there were three people who might have filled them in at that time?

Mr. Bruckner: If the court please, I object. I don't think that question is fair, based on the previous testimony.

Trial Examiner Bennett: Well, I am not sure just what the previous testimony was. I think we can go over it once more.

We are only interested in finding out just how much you do know about this. The question at the moment is, did three people write on those forms, or less, if you know?

A. Well, I can't remember. My wife may have put in some of the dates. She may have. She held the cards. I don't remember.

Trial Examiner Bennett: Next question.

Q. (By Mr. Eberle): Where you filled in one date, would your wife fill in another date, the same evening or later?

A. She would fill in the date that was missing.

Q. Then or later?

(Testimony of Marvin A. Herzinger.)

A. Well, then all the cards were completely filled in, all the cards were completely filled in at the time of signing. [87]

Q. In other words, the person signing would fill in one date at the time of signing, you would fill in one date and your wife would fill, filled, in another date?

A. No. If one date was filled in by me, I filled in both dates.

Q. Will you examine these that you have testified to and tell me which dates you have filled in?

A. I will have to take that back. They were all completely filled out by the person signing them.

Mr. Eberle: I move to strike that last part unless you are a handwriting expert. Whether that is your handwriting on there, I move to strike out the balance of the answer.

Mr. Bruckner: May I have that answer read back?

Trial Examiner Bennett: Read the question and answer back.

(Last question read.)

Mr. Eberle: I move to strike that. That is not responsive to any question.

Mr. Bruckner: The answer was completely responsive in terms of—

Mr. Eberle (interrupting): I asked him whether he had filled in, in his handwriting—

Trial Examiner Bennett: In effect, the answer is responsive indirectly. I will permit the answer to stand.

(Testimony of Marvin A. Herzinger.)

Q. (By Mr. Eberle): Are you a handwriting expert?      A. No. [88]

\* \* \* \* \*

Q. (By Mr. Eberle): Are you a handwriting expert?      A. No.

Q. You said that you made certain statements when you obtained the signatures to these cards. What did you say to them?

A. I just explained to them the reason for signing these, which was——

Mr. Bruckner (interrupting): There is an objection. This is more than questions that go to the cards or the introduction into evidence of the cards.

Mr. Eberle: I can inquire about that after this, yes. That is all right.

Mr. Bruckner: I don't know if I have completed my examination, but I want to have an opportunity to see if I have.

Mr. Eberle: Of course, it goes to the manner and circumstances under which they were signed and I want to interrogate on it either now or later. I don't want to waive it by permitting them to be introduced.

Trial Examiner Bennett: I think the line might probably be developed, then, before the introduction of the cards.

Mr. Weston: It is stated in our answer that certain coercive methods were used.

Trial Examiner Bennett: I have your answer in mind.

Mr. Bruckner: I will withdraw my objection. I

(Testimony of Marvin A. Herzinger.)

think the [89] objection is a valid one, but I will withdraw it.

Trial Examiner Bennett: You were questioning him about statements he made.

The Witness: Go ahead?

Q. (By Mr. Eberle): Yes.

A. I made statements to these people about what the union could do or could not do for them, what power the union had, also what effects it would have on them by signing these cards.

Q. In other words, you told them, for instance, if they signed, then they could get out of the twenty-five dollar initiation fee, which they had to pay, which they would have to pay, if they didn't sign?

Mr. Bruckner: Objection.

Trial Examiner Bennett: You may answer.

A. Well, the initiation fee, I wasn't——

Trial Examiner Bennett (interrupting): You are just being asked if you said that. Either you did or you did not.

A. I don't recall for certain, but I don't think that I did. I will put it that way.

Q. (By Mr. Eberle): You may have said it, but you don't recall?

A. I don't recall. I doubt if I did.

Q. All right. Did you tell them that they might be fined or lose their jobs if they didn't join?

A. No. [90]

Q. Did you say anything about their being fined?

A. No.

Q. If they didn't sign these cards?

(Testimony of Marvin A. Herzinger.)

A. No.

Q. Did you tell them that by signing, that the matter would then go to an election?

A. I wasn't certain what it would go to. I am not up on all those regulations.

Trial Examiner Bennett: You are just being asked if you told them that, sir.

Q. (By Mr. Eberle): Did you tell them if they signed the matter would then be decided by an election?      A. No.

Q. You didn't tell them that. Who else made statements when these were signed, the ones you are testifying to?

A. At the time I was talking, nobody.

Q. You were there all alone?

A. No. The others——

\* \* \* \* \*

Q. (By Mr. Eberle): But they made no statements or comments, they just stood there while you talked? [91]      A. Yes.

Q. Of these six people, you were the only one who made any statement to them?

A. Right.

Q. No one else did at the time?

A. Well, there was talking going on. About, as far as making a direct statement about what would happen, there wasn't.

Q. The two women who were with them did talk to them?

A. They talked about other matters and union matters also.



(Testimony of Marvin A. Herzinger.)

Q. They didn't talk about any union matters?

A. They may have some, but very little.

Q. What statements did they make with reference to the initiation fee?

A. They made no statements to, on that.

Q. With reference to fining? A. None.

Q. With reference to losing their jobs?

A. None.

Q. With reference to the matter of just merely bringing it up to an election? A. None.

Q. Nothing at all? A. No.

Q. Which one did you go to first, of this group?

A. I went to my wife first.

Mr. Bruckner: That is not in that group. [92]

Q. (By Mr. Eberle): The next one?

A. As close as I can remember, it was Bill Hoffman.

Q. All right. Now, he was the first one. And what did you tell him how many had signed up when you went there?

A. We didn't give any information out.

Q. Who was the second one you went to?

A. As close as I can remember, it was Tofanelli.

Q. What did you tell her about how many had signed up? A. Same thing.

Q. No statement at all? A. No statement.

Q. Who was the next one?

A. I couldn't say that. I don't remember.

Q. Well, give us the approximate order. It may not be exact. But as close as you can give it to us.

(Testimony of Marvin A. Herzinger.)

Trial Examiner Bennett: We are interested in how much you do know about the subject matter. If you contribute something, fine. If you don't know, just say so.

A. As close as I can remember, it was Evelyn Pharris.

Q. (By Mr. Eberle): What did you tell her about how many had signed up?

A. Nothing.

Q. That is Elizabeth, isn't it? Or Evelyn?

A. Elizabeth.

Q. And you said nothing about how many had signed up. Then [93] where did you go from there?

A. I believe Thora Panter was the next.

Q. And you made no statement to her about how many had signed up?      A. No.

Q. Now, then the next one, Godfrey or Going.

A. Going.

Q. Did you make any statement to him about how many had signed up?      A. No.

Q. And the last one, then, would be Godfrey. Did you make any statement to him?

A. No.

Mr. Eberle: That is all.

Mr. Bruckner: May I have a ruling?

Trial Examiner Bennett: Is there any objection to the receipt of the six cards?

Mr. Eberle: No objection as far as having identified them.

Trial Examiner Bennett: Is there any other objection?

Mr. Eberle: We are going to raise a question ultimately, when this case is all over, as to whether they were voluntary, whether the signing of them was a voluntary act of the parties involved.

Trial Examiner Bennett: All right. I will receive the cards at this time, namely 7-A, C, D, E, and S-H and I. \* \* \* \* \* [94]

ERMA HERZINGER

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Bruckner): Your name and address, please.

A. Erma Herzinger, 3824 Jason Avenue Southeast, Pocatello.

Q. I take it, you are the wife of Marvin Herzinger who just testified? A. Yes, sir.

Q. Have you ever been an employee of the Idaho Egg Producers? A. Yes, sir, I have.

Q. When were you an employee of that company?

A. In July of '52 to October and then I went back in June of this year and worked until a week ago Friday.

Q. When you say "October", you mean July '52 to October '52, [95] is that correct?

A. Yes, sir.

Q. (By Trial Examiner Bennett): And you worked until a week ago Friday?

(Testimony of Erma Herzinger.)

A. Yes, sir.

Q. (By Mr. Bruckner): Do you know the date of employment in July 1952?

A. No, sir, I don't.

Q. Do you know the date of termination in October '52?

A. Yes. It was approximately the 30th, I imagine.

Q. Do you know the date of re-employment in June '53?      A. June 1.

Trial Examiner Bennett: A week ago Friday would be approximately January 15, I believe.

Q. (By Trial Examiner Bennett): Does that sound right to you?      A. Yes.

Q. (By Mr. Bruckner): And that is when you were terminated?      A. Yes, of this year.

Q. What was your job, Mrs. Herzinger?

A. Egg candler.

Q. Where did you work in the plant?

A. I worked in the basement.

Q. How many floors are there?

A. There's two.

Q. How many other girls worked with you in the basement, on [96] the candling floor?

A. Approximately 12.

Q. (By Trial Examiner Bennett): Did men work down there, too?      A. One.

Q. Twelve girls and one man?

A. Yes, except when they are processing and then they have maybe two men.

Q. Processing what?      A. Eggs.

(Testimony of Erma Herzinger.)

Q. (By Mr. Bruckner): I will show you, Mrs. Herzinger, 7-B, General Counsel's exhibit for identification, and ask you if that is your signature thereon? A. Yes, it is.

Q. And the date shown thereon is September 21, 1953. Is that the date upon which you affixed your signature? A. Yes, sir, it is.

Q. Now, there is a name shown on the line entitled "Signed", "Ida Mae Brooks". Do you know Ida Mae Brooks? A. Yes, I do.

Q. Did you know her prior to September 21 of 1953? A. Yes.

Q. Did you see her affix her signature thereto?

A. Yes.

Q. (By Trial Examiner Bennett): When was that? A. September 21. [97]

Q. (By Mr. Bruckner): I will show you 7-F for identification and ask you if the signature shown on the line entitled "Witness" is yours.

A. Yes, sir.

Q. Now, the date shown thereon is September 22, 1953. Is that the date upon which you affixed your signature? A. Yes.

Q. On the line entitled "Signed" there is a purported signature of Mrs. Evelyn Pharris. Do you know Mrs. Evelyn Pharris?

A. Yes, I do.

Q. Did you know her before September 22, 1953? A. Yes.

Q. Did she affix that signature to that document in your presence? Did you see her do it?

(Testimony of Erma Herzinger.)

A. Yes.

Q. And what was the date of that?

A. September 22.

Q. 1953?            A. Yes, sir.

Q. I will show you 7-G for identification. Is that your signature?            A. Yes, sir.

Q. The date shown is September 22, 1953. Is that the date upon which you put your signature thereon?            A. Yes. [98]

Q. The name shown thereon on the line opposite "Signed" is "Lena Panter". Do you know Lena Panter?            A. Yes.

Q. Did you know her before September 22, 1953?            A. Yes.

Q. Did you see her affix her signature to that card?            A. Yes.

Q. Was it done on September 22, 1953?

A. Yes.

Q. I will show you 8-B for identification and ask you if that is your signature?            A. Yes.

Q. The date shown there is 9/22/53 or September 22, 1953. Is that the date upon which you affixed your signature?            A. Yes.

Q. The signature shown on the line entitled "Signed" is "Gene Ellsworth". Do you know him?

A. I don't know him personally. I have seen him, but I don't know him.

Q. Have you had occasion to meet him?

A. Yes.

Q. Did you meet him before September 22, 1953?

A. Yes.

(Testimony of Erma Herzinger.)

Q. Where did you meet him?

A. In the plant.

Q. You knew he was an employee of the plant?

A. Yes.

Q. And did you see him affix his signature to that card?      A. No, I didn't.

Q. You did not see him affix his signature?

A. No. Mrs. Jensen witnessed it. However, I was there. I mean, I was right across the way and I did see Gene writing, but I didn't see him actually put his name on the paper.

Q. (By Trial Examiner Bennett): You saw him writing on that slip of paper?

A. Yes, but—is it all right to go on?

Q. Go ahead.

A. He went then to Mrs. Jensen because he knew her and she was one of the girls who was also implicated, and she said beings as how I had seen him, for me to witness it.

Trial Examiner Bennett: Next question.

Q. (By Mr. Bruckner): Was that done on September 22, 1953?      A. Yes.

Q. I will show you 8-C for identification and ask you if that is your signature?      A. Yes.

Q. Was that put on that authorization card on September 22, 1953, which is the date shown?

A. Yes.

Q. Do you know Frances F. Sladek?

A. Yes. [100]

Q. Did you know her before September 22, 1953?      A. Yes.

(Testimony of Erma Herzinger.)

Q. Did you see her sign that card?

A. Yes.

Q. What was the date on which you saw her sign it?      A. The 22nd of September.

Q. '53?      A. Yes.

Q. Showing you 8-D for identification, does that bear your signature?      A. Yes.

Q. Did you sign that on September 22, 1953?

A. Yes.

Q. It is a signature purporting to be that of Velma Armstrong on the line entitled "Signed". Do you know Velma Armstrong?      A. Yes.

Q. Did you know her before September 22, 1953?      A. Yes.

Q. Did you see her sign that card?

A. Yes.

Q. On what date did you see her sign it?

A. September 22, 1953.

Q. I will show you 8-E for identification. Now, on this card your signature, or the signature purporting to be yours, appears on the line entitled "Signed". Is that your signature? [101]

A. Yes.

Q. In other words, that is the authorization card that you personally signed?      A. Yes.

Q. What date did you sign it on?

A. September 21, 1953.

Q. 8-F for identification, does that bear your signature?      A. Yes.

Q. On what date did you sign it?

A. The 22nd of September, 1953.



(Testimony of Erma Herzinger.)

Q. That purports to bear the signature of one Janet Stoddard. Do you know Janet Stoddard?

A. Yes.

Q. Did you know her before September 22, 1953? A. Yes.

Q. Did you see her sign that? A. Yes.

Q. 8-G, is that your signature? A. Yes.

Q. The date that you signed that is what?

A. September 21, 1953.

Q. And the signature purporting to be that of Ruthe Jensen appears thereon. Do you know Ruthe Jensen? A. Yes.

Q. Did you know her before September 21, 1953? [102] A. Yes.

Q. Did you see her sign it? A. Yes.

Q. On what date did you see her sign it?

A. September 21, 1953.

Q. All of these cards that I have shown you and asked you to testify about, that I mentioned, were signed by certain people. Were all of these employees of the company at that time?

A. Yes.

Q. You were in the courtroom when——

Mr. Bruckner: Strike that.

At this time I will offer in evidence General Counsel's Exhibits Nos. for identification 7-B, F, G and 8-A, B, C, D, E, F and G.

Mr. Eberle: May I inquire?

Mr. Bruckner: Yes, sir.

Q. (By Mr. Eberle): Can you tell us, Mrs. Herzinger, which one you had sign first, of this list?

(Testimony of Erma Herzinger.)

A. Which person I had sign?

Q. Yes.            A. Mrs. Jensen.

Q. That is No. 1?            A. Yes.

Q. And then No. 2.

A. I was the second. [103]

Q. You were the second. All right. No. 3?

A. I believe Mrs. Christenson.

Q. All right. No. 4?            A. Bill Hoffman.

Q. Who?            A. Bill Hoffman.

Q. Hoffman?            A. Yes.

Mr. Eberle: I thought you had—well, all right.

The Witness: Well——

Mr. Bruckner: Let her explain it.

The Witness: However, Mrs. Jensen and I and Donna were together when we signed ours and that was before we had contacted anyone else.

Q. (By Mr. Eberle): All right. And you had Hoffman next. And then who did you go to?

A. I don't remember. It was Carrie Monroe, I believe.

Q. Who?            A. Carrie Monroe.

Q. You haven't got her on this list. I am talking about these.

Q. (By Trial Examiner Bennett): We are talking about the cards that you just identified.

A. Thora Panter.

Q. (By Mr. Eberle): Thora Panter?

A. Yes, as far as I can remember. [104]

Q. (By Trial Examiner Bennett): You said you had Bill Hoffman sign?            A. Yes.

(Testimony of Erma Herzinger.)

Q. Isn't that your husband's signature (indicating)?      A. Yes.

Q. The questions are directed only to the ones that you signed.

A. To the ones I signed, all right.

Trial Examiner Bennett: I think that is right.

Mr. Eberle: Yes.

The Witness: You have Thora Panter?

Q. (By Mr. Eberle): Yes.

A. I believe Ida Brooks was the next, but I am not sure.

Q. All right.

A. And then Evelyn Pharris.

And then Velma Armstrong.

And then Frances Sladek.

And Janet Stoddard.

Q. Were there any of these who wouldn't sign the first time you talked to them?

A. Well, there was Frances, who was debatable. She said she would sign if everyone else would.

Q. Frances who?      A. Sladek.

Q. If everyone else would. Who else?

A. Well, they all felt the same way. [105]

Q. (By Trial Examiner Bennett): What way?

A. That if everyone else would sign, they was willing to sign.

Q. (By Mr. Eberle): Did you fill the dates in on these cards?

A. I may have on one or two, but I don't remember for sure.

Q. Now, your husband said it wasn't his hand-

(Testimony of Erma Herzinger.)

writing. Will you see if your handwriting is on any of those dates?

A. I can't tell. I can't tell whether the dates——

Q. You can see it is different handwriting, can't you?

A. I believe I filled out Velma Armstrong's date.

Q. Which one did you fill out?

A. The top one.

Q. The top one?                      A. Yes.

Q. Who filled in the bottom one?

A. (No response.)

Q. The bottom one is not your handwriting?

A. No, it isn't.

Q. (By Mr. Bruckner): Which card is that?

A. Velma Armstrong's.

Q. (By Mr. Eberle): All right. What other ones?

Trial Examiner Bennett: That would be 8-D.

A. So far all by myself. That is all, sir.

Mr. Eberle: That is all. Thanks.

Trial Examiner Bennett: You are offering the ones she identified? [106]

Mr. Bruckner: That is right.

Mr. Eberle: No objection to the competency.

Trial Examiner Bennett: No objection to what?

Mr. Eberle: To the competency.

Trial Examiner Bennett: I will receive 7-B, 7-F, 7-G, 8-A, 8-B, 8-C, 8-D, 8-E, 8-F and 8-G. I believe that completes all the cards.

Mr. Bruckner: It had better or else something is wrong.

(Testimony of Erma Herzinger.)

(The documents heretofore marked General Counsel's Exhibit Nos. 7-B, 7-F, 7-G, 8-A, 8-B, 8-C, 8-D, 8-E, 8-F and 8-G for identification were received in evidence.)

Q. (By Mr. Eberle): Did you tell any of these people, Mrs. Herzinger, they might lose their jobs if they didn't sign? A. No, I didn't.

Q. (By Mr. Bruckner): Do you know Nina Cordell? A. Yes.

Q. Who is she?

A. She was an egg candler.

Q. Was she working there on September 21 and September 22, at the company?

A. Yes, I believe she was.

Q. Do you know where she worked in relationship to where you worked?

A. She worked at Pay-less Drug.

Q. No. She worked as an egg candler in the basement, did she? [107] A. Yes.

Q. Was she near you, in your work?

A. Yes.

Q. How close to you?

A. She was right next to me.

Q. In other words, her station was right next to yours? A. Yes.

Q. Did you see her sign a card similar to the authorization cards which you have just identified?

A. Yes, sir.

\* \* \* \* \*

Trial Examiner Bennett: Is the card available?

Mr. Bruckner: No, sir.

(Testimony of Erma Herzinger.)

Trial Examiner Bennett: This is one of the missing cards?

Mr. Bruckner: Yes, sir.

Mr. Eberle: Where is she?

Mr. Bruckner: I don't know where she is.

Trial Examiner Bennett: Is this somebody still in the company's employ?

Mr. Bruckner: I don't know, sir. I don't know if she is or not.

Mr. Weston: Yes.

Mr. Eberle: She is still there.

Q. (By Mr. Eberle): She is where, do you know? [108]

A. No. I don't know how you can get in contact with her. She isn't working at the present time.

Trial Examiner Bennett: I believe you stated before that there are several cards which have been lost by the union?

Mr. Bruckner: Yes, sir.

Trial Examiner Bennett: And this is one of them?

Mr. Bruckner: Yes, sir.

Trial Examiner Bennett: I am disposed to take the testimony under the circumstances. If Respondent wishes to rebut it, I will take that testimony, too.

Mr. Bruckner: I don't know if there was an answer to the question I asked, but I will repeat my——

Mr. Eberle: Well, repeat the question, have the question read to her.

(Testimony of Erma Herzinger.)

Mr. Bruckner: It doesn't make any difference.

Q. (By Mr. Bruckner): Did you see Nina Cordell sign an authorization card similar to the ones you just identified?           A. Yes, sir, I did.

\* \* \* \* \*

Q. (By Trial Examiner Bennett): When did you see this happen?

A. It was about the 22nd of September, 1953.

Q. What were the circumstances?

A. She was in her booth, next to me, and I watched her sign it.

Q. Did someone ask her to sign? [109]

A. No. I gave her the slip.

Q. You gave her the card?

A. And I told her she could sign if she wanted to.

Q. What happened then?

A. She signed it.

Q. What happened then?

A. She gave it to me.

Q. What did you do with the card?

A. I gave it to my husband.

Trial Examiner Bennett: That is all I have.

One other question.

Q. (By Trial Examiner Bennett): Was this slip identical to the ones you just testified about?

A. Yes.

Mr. Weston: Is it understood that our objection goes to your questions, too?

Trial Examiner Bennett: I will give you an objection to the entire line.

Q. (By Mr. Bruckner): Your testimony is that

(Testimony of Erma Herzinger.)

you think it was about September 22 when you secured the signature?      A. Yes, approximately.

Q. Did you turn that card in, together with the other cards, to your husband at the same time?

A. I don't remember if they were with that list or not. We put them, took them down twice, and I don't remember which group [110] they were in.

Q. Do you know if it was before or after that union meeting?

A. It was after, I believe.

Q. Do you know Carrie Monroe?

A. Yes, I do.

Q. Who is she?

A. She is an egg candler.

Q. Was she working at the plant on the week of September 20?      A. Yes.

Q. Did you see her sign a card?

A. No, I didn't see her. Mrs. Jensen did.

Trial Examiner Bennett: I would have like to have had a little more testimony concerning the circumstances under which the cards were lost.

Mr. Bruckner: I made an offer of proof. I will be glad to call Mr. Lott.

I think possibly this ought to be on the record. I am interested in making a complete record. As I recall—and this is, of course, subject to correction—the record shows that the cards were given to Mr. Lott and he made a search for them and he was unable to find certain cards, and I think in relation to that one name was mentioned, Carrie Monroe, but Nina Cordell's was not named. Now, what I



(Testimony of Erma Herzinger.)

can do is recall Mr. Lott for that specific purpose. I will be very happy to. As a matter of fact, I will allow the Trial Examiner to do the interrogation.

\* \* \* \* \* [111]

Q. (By Mr. Bruckner): Who is your supervisor?  
A. Azella Taylor. [112]

\* \* \* \* \*

Q. (By Mr. Bruckner): Were you at the meeting of the employees at the Labor Temple on September 22, 1953?  
A. Yes, sir, I was.

Q. I will ask you if after that meeting, while you were at work, you had a conversation with Mr. Slayden or overheard Mr. Slayden, the branch manager, say anything about the union.

A. Would you please repeat that question?

Q. All right. I will direct your attention to Saturday, September 26, 1953. Were you at work on that day?  
A. Yes.

Q. Did you hear Mr. Slayden on that day say anything about the union?

A. On Saturday, September 26?

Q. Yes.  
A. Yes. He came down.

Q. Where did he come down?

A. Downstairs.

Q. In the basement, where you were working?

A. Yes. [113]

Q. About what time of the day was this, please?

A. I would say about 10 o'clock.

Q. Do you know which girls were working in the basement about that time?  
A. Yes.

Q. Can you name them?

(Testimony of Erma Herzinger.)

A. There was Carrie Monroe, Carrie Tofanelli and Frances Sladek, Ruthe Jensen and Elizabeth Pharris and Evelyn Pharris, myself and Nina Cordell, Ida Brooks and Thora Panter and Zina Jensen, and I don't recall if Janet Stoddard was there or not. I believe she was.

Q. Take your time in answering to this next question and just tell me as best as you can recall what he said at the time and what he did and what any of the girls said, if anything.

A. When he came down he said he didn't know why we had gone and tried to get the union in, that if we would have come to him he would have tried to do what he could for us, but he said that if the union did—I will retract that—if they did bring the union in, that he could bring a machine in and they could cut down on the work. And he said that if we would have come to him maybe he could have worked it out so that we could have our Saturdays off if that is what we wanted. And also he said that all the union would do is cost us dues.

Q. Do you recall anything else that he said during the course of this? [114]

A. He just told us to get in our booths and do our work.

Q. Do you recall whether anything was said about knowing who signed up with the union?

A. Yes. He said he knew who started it and who signed.

Q. Did he say who started it or who signed?

A. No.

(Testimony of Erma Herzinger.)

Q. Was anything said about giving Saturdays off?

A. He said he would try to get us Saturdays off.

Q. Up until that time had you had Saturdays off?

A. No. However, I didn't go back until June. They may have had them off before that. I don't know.

Q. (By Trial Examiner Bennett): You mean before June of 1953? A. Yes.

Q. (By Mr. Bruckner): What kind of a work week were you on at that time? What were your hours?

A. From eight until four at that time.

Q. (By Trial Examiner Bennett): Was Saturday a regular day?

A. Saturday we worked from, what was it, 7 until 12.

Q. (By Mr. Bruckner): Do you recall if anything was said during that conversation about withdrawing from the union?

A. Yes. He also said if we wanted to go down and withdraw our names from the union he would furnish the transportation to go down and let us off of work.

Q. Do you recall anything else he may have said during the course of that conversation?

A. No, I don't right offhand. [115]

Q. Have you, before that date, before Saturday, September 26, 1953, ever had occasion to ask Mr. Slayden or any other company representative for

(Testimony of Erma Herzinger.)

Saturdays off?            A. No, I hadn't myself.

Q. After Mr. Slayden——

Mr. Bruckner: Strike that.

Q. (By Mr. Bruckner): Did any of the employees, if you know go down to the union to withdraw their cards?

A. Yes. There was two or three that got off earlier and so they went down and they called to say that Mr. Lott wasn't in his office, that it wouldn't do any good to come down.

Q. (By Trial Examiner Bennett): When did these two or three go down?

A. That was Saturday, the 26th.

Q. What time did they go, if you know?

A. Well, I would say it was approximately 10:30.

Q. (By Mr. Bruckner): Do you recall whether anything was said about finishing their eggs and leaving as soon as they had——

A. Yes.

Q. What was said?

A. He told us to finish what eggs we had and then we could go home.

Q. And do you know if any of the other employees, other than those employees who had gone down to the union and who had called, saying that the union wasn't open, had intended to go down?

A. Yes.

Q. Who were they?

A. Ruthe Jensen and—well, it was the rest of us, I guess.

Q. Had you intended to withdraw, too?

(Testimony of Erma Herzinger.)

A. Yes; if everyone else did there was nothing much I could do.

Q. (By Trial Examiner Bennett): How late did you work that Saturday?

A. It was about 10:30 when we got off.

Q. You said that two or three left at 10:30 and then telephoned back? A. Yes.

Q. Back to the plant?

A. Yes, and told Mrs. Jensen.

Q. Were you there?

A. Yes, I was there at the time.

Q. If you left at 10:30 and they left at 10:30——

A. (Interrupting) Well, they got off, when they got through they left to go down and some of us other girls didn't get through right at that time.

Q. They got through with their work?

A. Yes.

Q. Ahead of you people? A. Yes.

Q. And left immediately? A. Yes. [117]

Q. (By Mr. Bruckner): Do you know if any of the employees asked questions or said anything to Mr. Slayden after or during his talk?

A. The only thing I asked him is "What good would it do to withdraw our names."

Q. And what did he say?

A. And he says, "I don't know."

Q. Do you remember if anybody else said anything? A. No.

Q. After this September 26 talk did you continue to work Saturdays?

(Testimony of Erma Herzinger.)

A. No. We had, they worked one Saturday, but that was optional. We didn't have to work.

Q. Then, the hours were changed after that?

A. Yes. We started working eight hours a day and had our Saturdays off.

Q. (By Trial Examiner Bennett): Were your hours still 8 to 4?

A. They were from 8 to 4:30, and we had a half-hour to eat. We went back to work at 12:30.

Q. (By Mr. Bruckner): Were you present when Mr. Doss and Mr. Lott visited the plant on October 5?

A. No, I wasn't.

Mr. Bruckner: Nothing further.

### Cross Examination

Q. (By Mr. Eberle): Mrs. Herzinger, when did you first learn [118] that the men wanted to withdraw from the union?

A. The men? Well, there wasn't any men except Mr. Godfrey. He said that if the rest of us went down he would withdraw his. But I never contacted the rest of the men. They never said anything.

Q. (By Trial Examiner Bennett): When did you learn this from Godfrey?

A. Well, it was on Saturday, September 26.

Q. Before Mr. Slayden spoke?

A. After Mr. Slayden spoke.

Q. (By Mr. Eberle): You didn't know that they had decided to withdraw before that?

\* \* \* \* \*

A. No, I didn't know.

(Testimony of Erma Herzinger.)

Q. (By Mr. Eberle): Did you know why they decided to withdraw prior to that time?

A. Well——

Mr. Bruckner: Mr. Examiner——

Trial Examiner Bennett: I think counsel is entitled to interpose an objection before the witness answers. I think you will concede that.

Mr. Bruckner: Same ground.

Trial Examiner Bennett: I will sustain the objection to this question.

Q. (By Mr. Eberle): Then why did they decide to withdraw? The men I am speaking about.

A. I don't know why they decided.

Q. You knew, though, that they had?

A. The one.

Q. Just Mr. Godfrey? A. Yes.

Q. You knew nothing about the rest of them?

A. No, I didn't know how the rest of them felt.

Q. Now, Mrs. Herzinger, your husband said that when you were with him in organizing these employees you said nothing about the union. Now, when you were there without him what did you say about the union to these people? [120]

A. I never said anything to the girls.

Q. You just asked them, you handed them the slip and said, "Will you sign?"

A. No. All I told them was that we were trying to organize and get the union in, and I never threatened them or anything.

Q. I didn't ask you whether you threatened anyone. I asked you what you said.

(Testimony of Erma Herzinger.)

A. Well, that is all I told them, was they——

Q. That you weren't threatening?      A. No.

Mr. Bruckner: Objection.

Trial Examiner Bennett: Sustained.

Q. (By Mr. Eberle): What did you say?

Trial Examiner Bennett: Just what you said.

A. I said that, I told them that they could join the union if they wanted to and I told them that if they didn't sign these, all these slips were for was to authorize them to join the union, start the union deal working, and I didn't—that is all.

Q. (By Mr. Eberle): You didn't say it had to come to a vote, then?      A. No.

Q. That is all you said to them?      A. Yes.

Q. You didn't say anything about initiation fees?

A. Well, I said if it started we wouldn't have to pay initiation [121] fees now.

Q. But if they didn't sign now they might have to pay it later?      A. No.

Q. You didn't say that?      A. No.

Q. Did you tell them how many had already signed when you——      A. No.

Q. You didn't say a word about that.

The only time that you ever talked to Mr. Slayden or heard him talk was at the one meeting that you mentioned there on the 26th?

A. He came down one other time but I don't remember what he said.

Q. (By Trial Examiner Bennett): Before or after?      A. After.

Q. (By Mr. Eberle): That morning, you say,



(Testimony of Erma Herzinger.)

it was about 10:30?           A. Approximately.

Q. Isn't it a fact, it was about 11:30?

A. No.

Q. You don't think it was 11:30 when those girls left the plant?

A. No, I don't believe so.

Q. How late did some of them leave the plant that morning?

A. Well, we were the last ones there. We were waiting for Mrs. Jensen. She was helping to finish up the work.

Q. When was that? [122]

A. That was on a Saturday.

Q. When?

A. That was on Saturday. It was about, well, I don't know just about what time it was. About 10:30 approximately.

Q. You left the plant at 10:30 that morning?

A. Approximately, yes.

Q. (By Trial Examiner Bennett): Do I understand your previous answer that you are not certain about the time?

A. I am not sure. I didn't look at the time.

Q. (By Mr. Eberle): You always had to finish your work before you left?

A. Yes. We had to finish what we had.

Q. (By Trial Examiner Bennett): What was your answer?           A. Yes.

Q. (By Mr. Eberle): Egg candling is a seasonal employment, isn't it?           A. Yes.

Q. Do you know that whenever in prior years

(Testimony of Erma Herzinger.)

the volume slid off, then they wouldn't work on Saturdays?      A. I don't know about that.

Q. You don't know about that?

A. No. When I worked there we worked on Saturdays.

Q. When you didn't work on Saturday, did that give you any shorter hours for the week?

A. No. We started working eight hours a day, we worked from [123] 8 until 4:30 and we had a half-hour lunch.

Q. In other words, you had the same hours?

A. Yes.

Q. In other words, there were no shorter hours, but just——      A. No.

Q. And if there was work to do was it optional for someone to work on Saturdays, if there was eggs to candle?

A. Well, I don't believe anyone did work.

Q. And you didn't get any more overtime?

A. Not too much.

Q. What do you mean? I mean, if you worked the same number of hours, there would be no overtime, would there?

A. Well, no, but sometimes we worked of an evening if we had to.

Q. Well, that was simply when there were more eggs to candle?      A. Yes, sir.

Q. That was a common practice?      A. Yes.

Q. (By Trial Examiner Bennett): Are you paid by the hour—were you paid by the hour?

A. Yes.

(Testimony of Erma Herzinger.)

Q. When you went on a five-day basis did your weekly pay check change? Did it decrease? Did it increase?

A. No, I don't believe so. I got a raise, however, and that did bring my check up. [124]

Q. You got a raise, just for you or for everybody else, too?

A. Well, it is according to how many eggs you do. We had an average to make.

Q. You made an average and got a raise?

A. Yes.

Q. (By Mr. Eberle): In other words, you get a flat rate and then a certain amount for the number of eggs you do?

A. Yes. We get, they start us out at seventy-six and then we have to do so many eggs after that to get our raises.

Q. Get what? A. To get our raise.

Q. Well, you mean, you don't get the additional amount unless you do a certain number of eggs?

A. No.

Q. That is the standard of pay? A. Yes.

Q. When you were organizing the employees you didn't go to Mr. Slayden at all, did you, and talk to him? A. No.

Q. When did the girls start talking about withdrawing from the union?

A. It was the day Cecil came down and talked to us.

Trial Examiner Bennett: Who is Cecil?

The Witness: Mr. Slayden.

(Testimony of Erma Herzinger.)

Q. (By Mr. Eberle): They hadn't been talking about it before [125] that?

A. Not withdrawing, no.

Q. You don't know whether they were talking about it amongst themselves?

A. Well, they didn't say anything about it to me.

Q. When he came down that morning, when he got all through, didn't he tell you it was entirely up to you what you wanted to do, if you wanted to join or not join the union?      A. Yes.

Q. And he told you you were free to do whatever you wanted to do?      A. Yes.

Q. Mrs. Herzinger, one or two more questions. After the girls discussed it, they all wanted to withdraw?

A. Well, they didn't really want to, but they were afraid.

Q. (By Trial Examiner Bennett): Is this what they said?      A. Yes.

Q. (By Mr. Eberle): Who told you that?

A. They all said that they were afraid.

Q. Who told you they were afraid?

A. Well, there was Carrie Tofanelli.

Q. And who else?

A. And, well, Nina, and Frances—did I say Frances?

Q. Nina Cordell?

A. Frances Sladek. That is about all. [126]

Q. And they were afraid to stay in the union, those three told you that?

(Testimony of Erma Herzinger.)

A. Yes. They said they was. They knew it wouldn't go through.

Q. They knew it wouldn't go through?

A. Yes. They said they just might as well withdraw, the way everything went.

Q. Oh, I see. They might as well withdraw because it wasn't going to go through anyway?

A. Yes. They were afraid.

Q. Afraid of what?

A. Afraid of Cecil.

Q. Afraid of what?

A. Afraid of Mr. Cecil.

Q. (By Trial Examiner Bennett): We are only interested in what they said. Do you understand that? A. Yes.

Q. You understood that they were afraid of Cecil?

A. Yes. They said that they were afraid, it would mean their jobs if he found out who had signed, and he knew who had signed.

Q. (By Mr. Eberle): Wait a minute. I thought you said that he knew all about it.

A. He did know all about it.

Q. He had known it for sometime, hadn't he?

A. Yes.

Q. But all of a sudden on Saturday, then, they decided they [127] were afraid?

A. He came down and talked to us, yes.

Q. Hadn't he talked to some of you before that?

A. That I don't know. He hadn't talked to me.

(Testimony of Erma Herzinger.)

Redirect Examination

Q. (By Mr. Bruckner): Did you get paid for that time off you took on September 26, Saturday, even though you left early?      A. Yes.

Q. Do you know if the other girls got paid for it?      A. Everybody got paid.

Q. During Mr. Slayden's talk on September 26, Saturday, was anything said about knowing who was a member or who had signed an authorization card?

A. He said he knew who started it.

\* \* \* \* \*

Recross Examination

Q. (By Mr. Eberle): On prior Saturdays when you were working there, when you completed your work before Saturday noon did you go home early?

A. We left about 10 to 12, I imagine, yes.

Q. On prior Saturdays, if you would finish earlier than 12 o'clock, would you leave when you finished work?

A. Well, we very seldom finished. [128]

Q. But you would no occasion finish earlier than 12 o'clock?      A. I don't remember.

Q. (By Trial Examiner Bennett): You don't remember finishing early or what?

A. I don't remember finishing early.

Q. You always finished exactly at 12 o'clock?

\* \* \* \* \*

A. We would get through by about 11:30 and

(Testimony of Erma Herzinger.)

by the time we would get finished with the rest of it, it would be—oh——

Q. (By Mr. Eberle): Would he dock you then, between then and 12?           A. No.

Q. He would pay you?           A. Yes.

### Further Redirect Examination

Q. (By Mr. Bruckner): When you finished your work at 11:30 what did you utilize your time for between 11:30 and 12?

A. Well, a lot of us didn't get through when the other girls did and we would finish up and the other girls would go in and sit down. By the time we would get the eggs out and our place covered up and our booths swept out, mostly, for me, it would be time for me to go home.

Q. (By Trial Examiner Bennett: Did you ever leave before [129] 12 on those occasions?

A. About 10 to.

Q. (By Mr. Bruckner): Did you ever leave earlier than 10 to 12, if you can recall?

A. Not that I can recall, except that one Saturday.

\* \* \* \* \*

### Further Recross Examination

Q. (By Mr. Eberle): Some of the other girls, then, would leave before you would on these various Saturdays?

A. On this particular Saturday they did.

Q. I thought you said on some Saturdays some

(Testimony of Erma Herzinger.)

of the girls would leave and you would have to stay and finish up.

A. No. That was a misunderstanding.

Q. I see.

A. No. They would get through because they were just faster than some of us.

Q. And they would leave?

A. No. They would go in and sit in the lunch-room until the [130] rest of the girls got through.

Q. But they weren't working?      A. No.

Q. They weren't docked, either?      A. No.

Q. (By Trial Examiner Bennett): They did not leave the plant?      A. No. [131]

\* \* \* \* \*

### DONNA CHRISTENSON

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

#### Direct Examination

Q. (By Mr. Bruckner): Your name, and address, please.

A. Donna Christenson, in care of Mountain States Tel & Tel, Construction Department, Salt Lake City, Utah.

Q. You are here under subpoena served by myself upon you, calling for your presence here today, is that correct?      A. Yes.

Q. Have you ever been an employee of Idaho Egg Producers?



(Testimony of Donna Christenson.)

A. Yes. I worked there from July 9, 1952, to September 26, 1953.

Q. What was your job?

A. Or '53 to '54, that was. July 9, 1953—

Trial Examiner Bennett: This is January 1954.

The Witness: I was right the first time. Excuse me.

Trial Examiner Bennett: You originally said July 9, 1952, [132] to September 26, 1953, which would be last September?

The Witness: Yes. I would be right the first time, then.

Trial Examiner Bennett: Next question.

Q. (By Mr. Bruckner): You attended this meeting of the employees at the Labor Temple on September 22, 1953, did you? A. Yes.

Q. I will ask you if after that date, Mrs. Christenson, while you were working at the plant, did you have any conversations with Mr. Slayden, the plant manager, the branch manager, the subject matter of which was the union?

A. Yes. He came in and talked to me.

Q. When? A. On Thursday afternoon.

Q. That would be September 24?

A. Yes.

Q. Where were you working at the time?

A. I was working in the egg cartoning room. That was my department down there.

Q. That was in the basement? A. Yes.

Q. (By Trial Examiner Bennett): Where did you say that was?

(Testimony of Donna Christenson.)

A. I was the egg cartoner.

Q. What time of the day was this?

A. It was in the afternoon sometime. I am not sure of the exact time. [133]

Q. Was anyone else present?                      A. No.

Q. (By Mr. Bruckner): Will you state what he said to you and what you said to him at that time, as best you can recall?

A. Well, he came in, I was working that afternoon, and he said that, or he asked me what I knew about the union and I said that I didn't know any more than what the rest of them did, I hadn't heard anything more than just plain gossip, what everybody else know. And he started to tell me what the union, what disadvantages it would have, I mean, he told me that if the union went in that we wouldn't be getting off at 10 minutes to 12, in the afternoon at 5 to 4, like we had been doing, and that we also wouldn't be getting a Christmas bonus. And I listened to what he said and I told him that the only thing I had known about the union was that my husband was in the union and what it did, what it had done, for him. And that was all I can remember saying on that.

Q. (By Mr. Bruckner): Is that all you can recall him saying at that time?

A. No. It seems that he had told me that he knew who had started the union and he had heard from two various or different sources that I was one of the people that had started it.

Q. Did you reply to that?

(Testimony of Donna Christenson.)

A. Well, I told him that I wasn't going to say anything to jeopardize my job there and he could just draw his own conclusions as to what these other people had said.

Q. Do you recall whether anything else was said at that time?

A. I can't, I don't believe there was.

Q. Can you recall whether anything was said about somebody overseeing, to see that all the work was done?

A. Well, I had heard that in the morning.

Q. Just let's have what Mr. Slayden said.

A. No, I can't seem to remember him saying that.

Q. What is this Christmas bonus? Had you been receiving a Christmas bonus?

A. What they do, they give you two dollars for each month that you were there at the end of the year, just before Christmas.

Q. And that is the Christmas bonus?

A. Yes.

Q. (By Trial Examiner Bennett): Had you received one in December 1952? A. Yes.

Q. (By Mr. Bruckner): And that was the only conversation you had with him on that date, September 24?

A. I will direct your attention to September 25—that would be Friday—and ask you if you can recall Mr. Slayden and you conversing with respect to the union on that date.

A. Well, he came in that day, I am not sure of

(Testimony of Donna Christenson.)

the time, I believe it was in the morning—— [135]

Q. Where did he come in, to your place of work?

A. Yes, into the cartoning room where I was working.

Q. Was anybody else there?

A. No. I was alone.

Q. What did he say?

A. And he asked me if I had heard the rumor that was going around that if the union didn't go in the employees would be fired, and I told him that I hadn't heard that rumor, and he says, well, that he had talked to his lawyer the day before and his lawyer told him that, or he had talked to his lawyer and his lawyer was the best lawyer that he could get, and then he went on to say, he got quite mad then and he said that, oh, the whole thing was just a bunch of Communism, and turned around and walked out. And that was all that I can recall him saying on that day.

Q. (By Trial Examiner Bennett): Did he identify his lawyer by name?      A. No, he didn't.

\* \* \* \* \*

Q. (By Trial Examiner Bennett): What, again, was it that he [136] asked you with respect to this rumor?

A. He said that he had heard a rumor that if the union didn't go through, or go in, that the people who had been involved in it would be fired. And I told him that I had heard nothing in connection with a rumor like that.

Q. (By Mr. Bruckner): I will direct your at-

(Testimony of Donna Christenson.)

tention to Saturday, September 26, and ask you if you were present in the egg candling room when Mr. Slayden spoke to some of the employees.

A. No, I wasn't.

Q. Did Mr. Slayden speak to you concerning that meeting at all?

A. Yes. I believe it was just after he had talked to them, he came out in the cartoning room where I was working and he said that he had just talked to the girls and it was a shame I had missed what he had told them, and he turned around and left.

Q. Your job terminated or was terminated on that day, is that correct?

A. Yes, on the 26th. [137]

\* \* \* \* \*

Q. (By Mr. Bruckner): Do you know Mr. Talbot?      A. Yes.

Q. Did you have a talk with Mr. Talbot on or about September 26—that would be that Saturday—the subject matter of which was Slayden and Hoffman? Do you recall that?

A. Well, I wouldn't swear that it was that very day, but Mr. Talbot had——

Q. (Interrupting) Hold on just a moment. Would you say that, if it wasn't that very day, that it was after or before that day?

A. It was before that day.

Mr. Eberle: Before what day?

Mr. Bruckner: Before Saturday, September 26.

Q. (By Trial Examiner Bennett): Do I understand your answer to be that it may have been that

(Testimony of Donna Christenson.)

day or that it may have been before or that it was before? Just your best recollection.

A. I would say it was before the 26th.

Q. Who is Mr. Talbot?

A. As far as I know, he was foreman.

\* \* \* \* \*

Q. (By Mr. Bruckner): I would like you to fix this time just as closely as you can, and the date that you believe to be most accurate with respect to this conversation.

A. I would say it was the 24th, the first morning that I heard anything about the union from Mr. Slayden or from the [140] rest of them.

Q. Would you say, in any case, it would not be before the 24th?      A. No.

Q. And, in any case, it would not be after the 26th?      A. No—I wasn't there.

Q. You weren't there after the 26th?

A. No.

Q. So it was either on the 24th, 25th or 26th, and your best recollection is that it was on the 24th?

A. Yes.

Q. Was anybody present during the course of this conversation between you and Mr. Talbot?

A. No. It was quite early, in the morning just after I started.

Q. Will you state to the best of your recollection what he said to you and you said to him at the time?

A. Well, he came in and said, or asked me what I knew about the union. He said that they had re-

(Testimony of Donna Christenson.)

ceived a letter, or they had a phone call, from the union, stating that they were going to come in and also that someone had gone to Mr. Slayden and told him that the union was trying to get in and all the names of the people that had tried to get the union in.

Q. Did he mention who the someone was?

A. Yes.

Q. Who did he say it was?

A. He said it was Mr. Hoffman. [141]

Q. Who is Mr. Hoffman?

A. Mr. Bill Hoffman. He works upstairs.

Q. He works at the plant? A. Yes.

Q. He was working at the plant, at least, on that occasion, was he not? A. Yes.

Q. What else——

Q. (By Trial Examiner Bennett—interrupting): He said that Mr. Hoffman had gone to Mr. Slayden with the names? A. Yes.

Q. (By Mr. Bruckner): Do you recall anything else that was said in that conversation? Did you say anything and what else did he say?

A. He said if the union did come in it was going to be a lot harder for everyone because, he said, there wasn't going to be any shirking at all, that there would be someone to make sure that the work was done and that we weren't loafing. That is about all I can remember of that.

Q. Did you say anything to him?

A. Not that I can recall.

Mr. Bruckner: Nothing further.

(Testimony of Donna Christenson.)

Cross Examination

Q. (By Mr. Eberle): You now live in Salt Lake, Mrs. Christenson? [142]

A. My husband works out of Salt Lake, but at the present time we are moving around constantly. Right at the present time we are in Price, Utah.

Q. When did you leave Idaho to go to Utah?

A. I believe it was in November. I am not sure of any exact date.

Q. When was your husband transferred to Utah?  
Mr. Bruckner: Objection.

Trial Examiner Bennett: She may answer.

A. I am not sure of the date on that. I went with him when he went. It was in November. We went together, but I don't remember the date.

Q. (By Mr. Eberle): And you have been there ever since?      A. Yes.

Mr. Eberle: That is all. Or I would like to ask one question more.

Q. (By Mr. Eberle): Were you part of the group that did the original organizing?

A. Well, I signed. I mean, I wasn't the one who was right at the head of it, but I signed one of those and I went along with the rest of them because the rest of them wanted me to.

Q. I see. You went along with the others in organizing these employees?      A. Yes.

Trial Examiner Bennett: Off the record. [143]

(Discussion off the record.)

Trial Examiner Bennett: On the record.



(Testimony of Donna Christenson.)

Q. (By Mr. Eberle): With whom did you go to see these organizers?

A. Well, let's see. There was Mrs. Jensen, Mrs. Panter and Mr. Hoffman and Mrs. Monroe and Mr. Godfredson.

Q. (By Trial Examiner Bennett): Do you mean Godfrey?

A. Well, Godfrey. Bernard, that was.

Mr. Eberle: There is a Mr. Godfredson.

The Witness: No. It is not Alvin. It is the other one.

Q. (By Trial Examiner Bennett): Bernard Godfrey?

A. Yes. And then there was a Mr. Going. And I believe that is all, that I went with them.

Q. (By Mr. Eberle): Did you make any statement to them about the union?

A. I didn't know anything about it. I just sat and listened.

Q. Who made the statements about the union?

A. Mr. Herzinger was telling them about the union.

Q. And what did he say to them?

A. It's been so long ago, I can't remember just really what he did say to them.

Q. Did Mrs. Herzinger say anything about the union to them?

A. Not that I can recall. She more or less just sat and listened like I did.

Mr. Eberle: Could Mr. Weston ask her a question? [144]

(Testimony of Donna Christenson.)

Trial Examiner Bennett: If there is no objection.

(No response.)

Q. (By Mr. Weston): As I understand, you were one of the original group that helped to start this organizational campaign. Is that right?

A. Well, it was talked about, it had been for quite awhile, and I was home one night and I was asked if I wanted to go along with the others and say, tell them where these different people lived. They weren't sure of the addresses. And I went along on that basis.

\* \* \* \* \*

Q. (By Mr. Weston): Was the plan in organizing these employees to keep it secret so that the employer wouldn't know about it?

A. Not as far as anyone out and said anything about it.

Q. Wasn't there some argument or some objection about the fact that the employer had found out who was in the union? Do you know anything about that?

A. Well, the only thing about that, they just told me that someone had gone to Mr. Slayden and told him everyone that was [145] in it. I had never been told not to go to Mr. Slayden and tell him, not to tell anybody. And the only thing they said about the cards was that they had known about who had signed them. And I didn't say anything about that because it wasn't any of my business.

(Testimony of Donna Christenson.)

Q. Weren't you at the meeting where Mr. Hoffman got up and spoke, the first meeting?

A. Yes.

Q. Wasn't there some dissension or some argument or some discussion among the employees the next day about the fact that Mr. Hoffman had gone against the union?

A. Well, they all thought it was rather cowardly, the way he had done it. Instead of going out to Mr. Slayden in the plant, he had gone out before Mr. Slayden ever came to work. But I don't work with the rest of them in the plant, so I don't know what they talked about it.

Q. So the objection was to the fact that Mr. Hoffman had made this disclosure to the employer prematurely, is that right?

A. As far as——

Q. They didn't like that, did they?

A. No, they didn't think it was quite right to think that Mr. Hoffman would do that, when he seemed, in my own opinion, at the meeting, willing to be a ringleader.

Q. There has been some testimony in this record to the effect that when you people joined the union, or most of you, you [146] joined with the idea that you would join if everyone else would join. Is that correct?

\* \* \* \* \*

A. That is just about it.

Q. (By Mr. Weston): That is the way the campaign was carried on, wasn't it? And some of them objected to joining until all of them were in?

(Testimony of Donna Christenson.)

A. Pardon?

Q. Some of them objected to joining until all of them were in, is that right?

A. Well, there was only two that I can think of that were that way. They were rather skeptical about it until after they had attended the meeting and then after they had attended the meeting it seemed like they were all for it, all for the idea. There was no convincing them. They were ready.

Q. (By Trial Examiner Bennett): Do you mean that meeting of September 22?      A. Yes.

Q. (By Mr. Weston): Then, the next day was when they discovered that Mr. Hoffman had told the employer who was in the union?

A. I don't believe it was the next day. I believe it was the day after that. I am not sure.

Q. It was the day after that. And then Mr. Slayden came down to where you were working on the 24th? [147]      A. Yes.

Q. And had the talk with you privately?

A. Yes.

Q. And didn't he tell you at that time that he didn't care whether you did or didn't join the union?

A. He said it didn't make any difference to him.  
\* \* \* \* \*

Q. (By Mr. Weston): Well, I believe you testified that he said that they might lose their Christmas bonus or they might not get Saturday off, but did he tell you that that is what would happen to you if you joined the union?

(Testimony of Donna Christenson.)

A. No, he didn't say that to me and he didn't tell me, either, that they might not get Saturday off.

Q. Did you decide to join this group that was going to withdraw from the Union?

A. No. Mrs. Herzinger came in to me on Saturday morning and asked, she said Mr. Slayden was providing transportation over to withdraw from the union and asked me if I wanted to go and I told her no.

Q. What time was that?

A. I believe it was before 9:30, because I talked to Mr. Godfredson in the office about a quarter to 10 and it was before that time.

Q. So she told you that Mr. Slayden was going to furnish you transportation before he went down and talked to the employees, is that right?

A. Well, it was before that time because I went upstairs to talk to Mr. Godfredson at just about, it was either a quarter to 10, it was between a quarter to 10 and 10 o'clock, because I left shortly after that.

Q. Isn't it a fact that the employees decided to abandon the union or withdraw their authorization to the union when they discovered that Mr. Hoffman had told the employer about the membership? Wasn't that one of the reasons it was purged by the employees?

A. I don't believe so.

Q. Well, what was the reason that some of them wanted to get out of the union?

A. Well, some of them wanted to get out merely because of the fact that they were just afraid of

(Testimony of Donna Christenson.)

what would happen. I myself, Mr. Slayden had never done anything to me, but I was always half scared of him and I believe the rest of them were that way, too.

Q. (By Trial Examiner Bennett): When was it that they showed this belief or indicated that they felt that way?

A. Well, I would say it was on the day that Mr. Slayden found out about it. [149]

Q. Which day do you mean?

A. On the 24th.

Q. (By Mr. Weston): Coming back again to the 26th, you say that Mr. Slayden knew, or was going to offer transportation to these employees as early as 9 o'clock that morning?

A. That is when I was told.

Q. Who told you that?

A. Mrs. Herzinger came in. I was working and talking to Mr. Talbot at the time.

\* \* \* \* \*

Q. (By Trial Examiner Bennett): Do you know of your own knowledge what time he spoke to the employees on that Saturday morning?

A. I don't have the slightest idea. The only reason that I am so sure about the time is because they had a coffee break in the morning between 9:30 in the morning, they have one, and I had gone up to the office in that time to talk to Mr. Godfredson about my vacation.

Q. (By Trial Examiner Bennett): And it was before that that she spoke to you?

(Testimony of Donna Christenson.)

A. Before that, because right after that, that time, well, I [150] left.

Q. (By Mr. Weston): But Erma Herzinger did tell you that Mr. Slayden knew that the employees——

Mr. Weston: I will withdraw that question.

Q. (By Mr. Weston): But Erma Herzinger told you that the offer for transportation was coming from Mr. Slayden? A. Yes.

Q. About 9 o'clock in the morning?

A. I didn't say 9 o'clock in the morning.

Q. About 9 o'clock?

A. Sometime between 9 and 9:30, I would say.

Q. And that, of course, would be prior to the time that he went down and talked to the employees? A. I don't——

Mr. Bruckner: I object.

Trial Examiner Bennett: Sustained.

Mr. Weston: I am simply quoting what is in the record.

Trial Examiner Bennett: I believe she testified in answer to my question that she had no idea what time he spoke to the employees that morning.

Mr. Weston: I know, but there is other proof in the record——

Trial Examiner Bennett: In the record, but not according to this witness. I am aware of the record, but not according to this witness.

Q. (By Mr. Weston): There is some testimony here that two or [151] three employees left in a car to go over to the union. As a matter of fact, there

(Testimony of Donna Christenson.)

were five.            A. I don't know.

Q. You have no idea how many went over to the union?  
A. I have no idea.

Q. Were you talking with the rest of the employees that morning? Were you in the group waiting for this group to go over to the union hall?

A. No. Right after I finished talking to Mr. Godfredson, Mr. Slayden was in the office and I quit. I asked him, Mr. Slayden, "Do you want me to finish the morning?" and he said, "I don't care." And I went downstairs and put on my coat and left.

Q. (By Trial Examiner Bennett): What time was that?  
A. Just about 10 o'clock.

Q. (By Mr. Weston): So you were not among those awaiting the report from the girls who went to the union hall?  
A. No.

Q. When did you hear from that group?

A. I didn't even hear about that until right here in this room. [152]

\* \* \* \* \*

### EVELYN PHARRIS

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

#### Direct Examination

Q. (By Mr. Bruckner): Will you state your name and address, please?

A. Mrs. Orville R. Pharris.

Q. Give your name that you usually go under



(Testimony of Evelyn Pharris.)

and then we will take the name under which you signed this card.           A. O. K.

Q. (By Trial Examiner Bennett): What is your first name, your own name?

A. Evelyn, 451 North Seventh, Pocatello, Idaho.

Q. (By Mr. Bruckner): Have you ever been an employee of Idaho Egg Producers?

A. Yes.

Q. You are not now, I take it?           A. No.

Q. When were you employed there?

A. I believe it was sometime in August I started and——

Q. August of 1953?

A. 1953, and the last I worked there was December 5.

Q. The 5th?

A. No, it was one or two days before the 5th, because I had to go back and get my check. [153]

Q. (By Trial Examiner Bennett): The first few days in December?           A. Yes.

Q. (By Mr. Bruckner): And you worked continuously from the day you gave us as the start of your employment to the first few days in December?

A. Yes.

Q. What was your job?

A. I candled eggs.

Q. Where?           A. In the candling room.

Q. Is that the basement?

A. Yes, in the basement.

Q. That is the same place that Mrs. Herzinger worked?           A. Yes.

(Testimony of Evelyn Pharris.)

Q. Were you working there on September 26, 1953, which, to refresh your recollection, was a Saturday?      A. Yes.

Q. While you were working there on that day, do you recall that Mr. Slayden came down and spoke to the employees in that room?

A. Yes, he did.

Q. He did. Now, about what time of the day was this?

A. Well, I can't say just what time it was. I know it was around nine or after.

Q. You have been here in the hearing room during previous [154] testimony here, haven't you?

A. Yes. I am not sure just what time it was.

Q. (By Trial Examiner Bennett): Irrespective of what you may have heard in the hearing room, what is your best recollection of the time? If you don't know, just say so.

A. I don't remember what time it was, just exactly what time it was or anything.

Q. Was it the morning?

A. Yes, it was the morning.

Q. (By Mr. Bruckner): Do you recall the employees that were working there at that time?

A. Yes, most of them anyway.

Q. Will you name them, please, if you can?

A. Carrie Monroe, Carrie Tofanelli, Frances—I don't know how to pronounce her last name.

Q. Sladek?      A. Yes. And Mrs. Jensen.

Q. Which one?      A. Ruthe Jensen.

Q. And?

(Testimony of Evelyn Pharris.)

A. And Elizabeth Pharris and myself and Erma Herzinger and Nina Cordell and Thora—I don't know what her last name is, either.

Q. Panter?

A. Panter, all right, and Zina Jensen, I believe, and Ida Brooks, and I don't know if Janet was there or not. [155]

Q. Janet Stoddard?

A. Yes. I don't remember if she was there or not.

Q. Just take your time and describe to us in your own words what was said and done by Mr. Slayden and any of the employees at that time.

A. Well, Mr. Slayden came downstairs to the candling room and, well, I knew what he said, but I can't think of it now when I am up here.

Trial Examiner Bennett: You tell us just as well as you can recall.

If you want to ask a preliminary question, I think that it is permissible under the circumstances.

The record may indicate that the witness has been hesitating considerably.

Q. (By Mr. Bruckner): Do you recall Mr. Slayden saying that he would like to talk to you?

A. Yes. He said that he would like to talk to us about the union.

Q. Did you girls stay in your booths while he spoke to you?

A. No. We was standing by the door where we eat lunch.

Q. (By Trial Examiner Bennett): You stopped work after he came in?

(Testimony of Evelyn Pharris.)

A. Yes. He wanted to talk to us, so we went out there.

Q. (By Mr. Bruckner): Do you recall whether anything was said about joining the union? [156]

A. Well, he told us that if we would withdraw our cards, that if we wanted something like Saturdays off, or if it was possible that he would try and get it for us, and if we had some questions to come up to him about them, not to be afraid. And he said also that he would furnish transportation down.

Q. (By Trial Examiner Bennett): To where?

A. To the, well, I don't know what the name of that building is.

Q. (By Mr. Bruckner): The Labor Temple?

A. Yes, to the Labor Temple, where those cards were, to withdraw them, that we could candle eggs, the eggs that we had in our booth and after they were finished that we could go down and withdraw our cards, but to finish what eggs we had.

Q. What else do you recall him saying?

A. (No response.)

Q. Do you recall anything being said about overtime?

A. Well, he said that the girls, well, the reason they wanted to join, well, the girls wanted more overtime, and he said if we would withdraw our cards that he would try and give us more overtime and Saturdays off. So I believe we had one or two Saturdays off and then he said that——

(Testimony of Evelyn Pharris.)

Q. You mean, you had one or two Saturdays off when?

A. Well, after the girls wanted, they wanted Saturdays off, you know, and then work from 8 until 4:30 and have half an hour noon. [157]

Q. (By Trial Examiner Bennett): You said you had one or two Saturdays off. Was this before or after he talked to you?

A. After the talk. We had, I believe, it was one or two Saturdays off and then he said that those who wanted to work the next Saturday could and if they didn't want to they didn't have to.

Q. (By Mr. Bruckner): In other words, it became optional thereafter?

A. There was a few who worked and a few who didn't.

Q. Back to this talk on September 26, going back to this talk, do you recall if anything was said at that time about what would happen if the employees joined a union?

A. You mean, if the—what do you mean?

Q. If Mr. Slayden said in words or substance anything about what would happen, would there be any changes if the employees joined a union, joined the union?

A. Well, he said that if the girls joined the union that he wouldn't be able to give us time off, that we would have, you know, like getting paid for going home early or something, that we would have to work right up to the hour of the time that we were supposed to get off, where if we didn't join

(Testimony of Evelyn Pharris.)

that things that might be possible for us to be off a little early, that he would still be able to pay us for it, and in that way that the union couldn't do anything about it.

Q. Was anything said, if you can recall, about getting paid for up until 12 o'clock that Saturday?

A. Yes. He said if we wanted to we could go down and withdraw our cards and he would pay us up until noon.

Q. Can you recall whether Mr. Slayden said anything about his own feeling in the matter?

A. Well, he said that he hadn't slept for about three nights because he was worried about what the employers were going to do, that he thought that the, that if he had a talk with the girls, that between the girls and the, well, all of them that were involved in the union, that they could work it out together without involving the union it it, without the girls joining, that he thought those people could work it out together.

Q. Did he in any way indicate by words or actions how he felt about, aside from what you have already told us, how he felt about whether you should withdraw from the union?

A. Well, you mean if he said we had to or not?

Q. Yes, that is right.

A. He didn't say we had to. He said if we wanted to that he would furnish the transportation.

Q. After he left did any of the girls leave, do you know?

(Testimony of Evelyn Pharris.)

A. Well, Carrie Monroe left, but I don't know who the others were that left.

Q. Did you leave early that day?

A. Well, I was about the last one to leave. There was, I think there was, four of us went out and sat in Ruthe's car, waiting for Ruthe so that we could withdraw our cards. [159]

Q. (By Mr. Bruckner): You were going to withdraw, too?

A. Yes. And in the meantime, well, Carrie had called back and Mr. Slayden came out to the car. I don't know why he came outside. I guess he was going to leave. But anyway he came over to the car and talked to us and he said that he thought Ruthe was pretty brave because of the way she stood up, you know, and——

Q. Brave about what?

A. Let's see. How can I word it?

Trial Examiner Bennett: You put it any way you like.

A. (Continuing): Well, I don't know if he called her, I think he called her up to the office and he thought that he could talk to Ruthe and that she could talk to the girls better than anybody else.

Q. (By Trial Examiner Bennett): This is what Mr. Slayden told you at the car?

A. No. That is why Mr. Slayden thought that Ruthe, you know, was——

Q. Was brave?

A. Yes. And anyway he came out to the car and he was telling us about if we wanted something to

(Testimony of Evelyn Pharris.)

just ask him for it and if it was possible that he would get it for us, and that's when he told us that he hadn't slept very good because he was trying to think things over.

Q. (By Mr. Bruckner): I see. That is when he told you that. It wasn't at the meeting, then?

A. No. He told us out at the car about that.

Q. I see. Did you go down to the union to try to withdraw?

A. No, because when Ruthe's husband—no. I went back to the building or something and Ruthe said that they called, had called, and said that the place wasn't open. So I walked home.

Q. Ruthe Jensen told you that?

A. Yes. Ruthe said that it was closed. So I didn't wait for her to get through, finished working, so I just walked home.

Q. (By Trial Examiner Bennett): When you referred to "Ruthe" before, did you mean Ruthe Jensen?      A. Yes.

Q. (By Mr. Bruckner): What time did you complete your work and leave the plant?

A. I believe it was a little after 10 or 10:30. I am not sure what time it was. I know it was going on 11 when I went home.

Q. And you had waited out in the car for some time?

A. We had waited out there for Ruthe; you see, she helped Taylor check boards, so we was waiting for her to get off work.



(Testimony of Evelyn Pharris.)

Mr. Bruckner: I see. Nothing further.

### Cross Examination

Q. (By Mr. Weston): When Mr. Slayden came down to see you on Saturday morning, the 26th, about the first thing he said was that he wanted you people to get to work and quit talking about this union and other things?

A. I wouldn't say. I was clear in the back from where Mr. [161] Slayden was standing and I didn't hear the first things, few things, he said, and then I came up there.

Q. Did you hear him tell the group down there that the question of joining a union or staying in a union or getting out of a union was entirely up to you people?

A. Yes, he did say that. But the girls were afraid to stay in the union, part of the girls were going to drop out because they were scared. Well, then the other girls figured they might as well because if part of them were going to drop out they were surely going to lose, the union wasn't going to get in, so they were scared, if they left their names in, they were going to get fired, so they just wanted to withdraw their names, too.

Q. Prior to this meeting on September 26 some of you people knew that some of the others were going to get out of the union, didn't you?

Trial Examiner Bennett: Do you understand the question?

(Testimony of Evelyn Pharris.)

The Witness: Would you say that again, please?

Trial Examiner Bennett: The reporter will read it back.

Q. (By Mr. Weston): Well, prior to the Saturday meeting——

Trial Examiner Bennett (interrupting): Read the question.

Q. (By Mr. Weston—continuing): ——wasn't it rumored around the plant and wasn't it known that Mr. Hoffman had sort of gone back on the employees and informed the employer of the membership in the union? A. Yes. [162]

Q. That was common knowledge, wasn't it?

A. Yes.

Q. And you didn't like that? A. No.

Q. And didn't you also know that some of the men had decided, because of that act on the part of Mr. Hoffman, that they were going to get out of the union?

A. No, I didn't because I didn't talk to any of the men.

Q. But among the girls that rumor was also prevalent? A. You mean about him?

Q. Yes. A. Yes.

Q. And the girls didn't like it, either?

A. No, they didn't.

Q. So that even before Mr. Slayden came down and talked to you on Saturday there was some agitation towards getting out of the union, wasn't there? A. I never heard any.

Q. When did you decide to get out of the union?

(Testimony of Evelyn Pharris.)

A. Well, after Mr. Slayden came down he gave the talk and then all the girls said well, they would withdraw, and then I felt well, I might as well, too.

Q. So you stayed right there with the group that stayed around the plant to see what report Carrie Monroe, was it, would bring back? [163]

A. Well, you see, we all planned to go down, I mean, most of them anyway, and withdraw their names, our names, and before the girls had all finished up so that they could leave, why, Carrie had called up, but they didn't know she was going to call back.

Q. So your reason for wanting to withdraw from the union was because the rest were withdrawing?

A. That is right.

Q. And it is true that Mr. Slayden said you could stay in the union, you could get out of the union or you could join the union, as you saw fit?

A. Yes, but the girls were still scared.

Q. You are speaking for the girls or for yourself?

A. For myself, too. I was afraid of losing my job just the same as the rest of them.

Q. Did he say anything about anybody losing their jobs?

A. I don't remember just what he did say about it.

Q. Do you know of anyone down there who has ever lost their job from joining a union?

A. Well, not that I can think of.

Q. How long did you work there, did you say?

(Testimony of Evelyn Pharris.)

A. I worked there, I believe I started in August, until December.

Q. Just the one year. Had you worked there in former years?      A. No. [164]

Mr. Weston: That is all.

Q. (By Trial Examiner Bennett): Directing your attention to the Saturday morning when Mr. Slayden came down, what were you doing when he came down there?      A. Candling eggs.

Trial Examiner Bennett: That is all I have.

Any redirect?

#### Redirect Examination

Q. (By Mr. Bruckner): Did you work any Saturdays after that September 26?

A. Well, it's like I said, he told, I believe that was after he gave the talk, he said those who wanted to could and if they didn't want to they didn't have to. \* \* \* \* \*

#### RUTHE JENSEN

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows: [165]

#### Direct Examination

Q. (By Mr. Bruckner): Will you state your name and address, please?

A. Mrs. Ruthe Jensen, 1256 North Hayes.

Q. Pocatello, Idaho?

A. Yes, Pocatello.

Q. Are you an employee of Idaho Egg Producers?      A. Yes, I am.

(Testimony of Ruthe Jensen.)

Q. What is your job?

A. I am an egg candler.

Q. How long have you worked there?

A. About eight years off and on.

Q. You were at this meeting of the employees at the Labor Temple on September 22, 1953, weren't you?

A. Yes, I was.

Q. And you were at work that week, weren't you?

A. Yes.

Q. Do you know Carrie Monroe?

A. Yes, I do.

Q. Did you ever see her sign a card?

A. Yes.

Q. An authorization card similar to the one I show you, which is GC-7-A?

A. Yes.

Q. Where did you see her sign it? [166]

A. In my booth.

Q. When?

A. I can't remember dates.

Q. In relation to this union meeting, when would you say it was?

A. It was before the meeting.

Q. It was before that union meeting of September 22?

A. Yes.

Q. What did you do with the card after she had signed it?

A. I gave it to Erma.

Q. Erma Herzinger?

A. Yes.

Q. I will direct your attention to Thursday, September 24. That was two days after the meeting?

(Testimony of Ruthe Jensen.)

A. Yes.

Q. And I will ask you if you did not have a conversation with Mr. Slayden on that day, the subject of which was the matter of the union.

A. Yes, I did.

Q. When did this conversation occur?

A. Eight-thirty in the morning.

Q. Where?      A. In Mr. Slayden's office.

Q. Were you called to his office?

A. He asked me the night before if I would come up and talk to him. [167]

Q. And was anybody else present at that time?

A. No.

Q. Will you please tell us what he said to you and what you said to him at that time?

A. Well, I went into Mr. Slayden's office and I sat down and he asked me what made me do what I did and I didn't say anything for a minute. And he said that he had heard from other sources that I had been one of the main ones in this union. And I told him yes, that I wouldn't lie to him because I had, and he wanted to know why I hadn't come to him. And I said, "Well, I had been to you one other time and asked for more money but we couldn't get it." And he said, "Well, if the union comes in, you know", he said, "there is nothing saying that we will have a bonus or two weeks with pay, and you will have to punch a time clock", and he said there would be someone around to see that we were on the ball every minute.

(Testimony of Ruthe Jensen.)

Q. (By Trial Examiner Bennett): What was this about the bonus?

A. A bonus, we have a bonus check, he said there would be nothing in the union deal that said we would get that, that they had to pay that, I mean, you get two dollars——

Q. (Interrupting): Just what he said.

Q. (By Mr. Bruckner): What is the bonus?

A. Two dollars a month.

Q. When is it given you?

A. At Christmas. [168]

Q. Have you received it in the past?

A. Yes.

Q. Will you continue with your conversation that you had with Mr. Slayden?

A. And he also told me he had blueprints in the safe that would eliminate a lot of girls if they had it installed.

Q. If they had what installed?

A. Machinery, they had a machine down there.

Q. Yes?

A. And then he said he knew the names of the employees that had signed, and I said no he didn't. And he said yes, Bill had been to his house and told him.

Q. Bill?

A. Bill Hoffman. So he called Bill in. And I asked Bill, I said, "Did you tell Mr. Slayden about this?"

Q. You mean, Bill Hoffman came in?

A. Yes, Bill Hoffman came in.

(Testimony of Ruthe Jensen.)

Q. I see.

A. And he said that yes, he had told Mr. Slayden about the union and he was sorry that he had ever had anything to do with it. And I just waited around and thought maybe he would leave. And he felt bad and started to cry, so Mr. Slayden——

Q. Who started to cry?

A. Mr. Hoffman started to cry. So I went downstairs.

Q. (By Trial Examiner Bennett): You left while he was crying? [169]      A. Yes.

Q. (By Mr. Bruckner): Is that all you can recall about that conversation?      A. Yes.

Q. Do you recall whether anything was said about wanting Saturdays off then?

A. Oh, yes. Mr. Slayden asked me what was some of the things the girls would like and I says, "Well, for one thing, they would like more money and Saturdays off", and he said, well, he couldn't give us more money but he would try and get our Saturdays for us, which he did.

Q. Did you tell the girls what Mr. Slayden had told you?

A. Yes. I went down and told them, tried to, the best way I knew how, what he had said.

Q. (By Trial Examiner Bennett): When did you do that?

A. Just after I had talked to him. And I tried to explain it to them the best way I knew what we would get and what we wouldn't get. And right then



(Testimony of Ruthe Jensen.)

and there, well, some of them had decided they didn't want to belong anyhow.

Q. (By Mr. Bruckner): Did you hear Mr. Slayden talk on Saturday, September 26, in the candling room?      A. Yes, I did.

Q. You were there at the time?      A. Yes.

Q. Do you recall who else was there at the time?

A. All the girls were there, who candled.

Q. Can you name them?      A. Yes.

Q. Who were they?

A. Carrie Monroe, Carrie Tofanelli, Frances Slepicka, myself, or Ruthe Jensen, Elizabeth Pharris, Zina Jensen, Thora Panter, Erma Herzinger, Evelyn Pharris, Janet Stoddard, Nina Cordell, Ida Brooks and Jo Ann—I can't think of her last name—she may have come in afterwards.

Q. What time of the day was this?

A. It was after we had coffee and that was about a quarter, about 9:30 that we had coffee.

Q. Did you hear what he said from the beginning to the end?      A. I think I did.

Q. Well, will you tell us to the best of your recollection what he said and what was said by any of the employees, if anything?

A. Well, he came in and told us to get back to work, we were all out of our booths, and he said, "Get back to work", and he said to get our eggs done, that our average was down and our sheets were all off. So he says, "About this union, I don't care what you do, one way or the other", he says, "Do it to suit yourself." He said that he had never

(Testimony of Ruthe Jensen.)

been a union man and he never did, he wasn't ashamed to admit it. And he said that if we wanted to withdraw our names that he would furnish transportation. [171] And I think that is all that was said.

Q. Do you recall whether any of the girls asked if they could withdraw?

A. I don't know whether they did or not.

Q. Do you know if any of the girls did decide to go down there and withdraw, to the Labor Temple?

A. Pardon?

Q. I say, do you know if any of the girls did go down to the Labor Temple to withdraw?

A. Yes.

Q. Incidentally, during the course of this conversation did he say if the girls would be paid to 12 o'clock noon anyway?

A. Yes, he did.

Q. What did he say? You tell me.

A. Well, he just said to finish our eggs and after we had finished and gotten our work done we could go on home and he would continue paying us to noon.

Q. Was this the usual procedure or was this unusual?

A. Well, we always worked until noon, so I imagine he was just going to be nice enough to pay us until then so we wouldn't lose any time.

Q. Had you had Saturdays off prior to that time?

A. Well, in the time I have worked there I haven't had many.

(Testimony of Ruthe Jensen.)

Q. What was the usual procedure——

Mr. Bruckner: Strike that. [172]

Q. (By Mr. Bruckner): What were your hours before this day?

A. Well, we worked seven hours a day and five hours on Saturday to get our 40 hours in.

Q. How long had you been working on that kind of a shift before September 26?

A. A long time.

Q. What would you say was a long time?

A. A couple of years.

Q. A couple of years. And after September 26 did this shift change? A. Yes.

Q. What was it changed to?

A. It was changed to eight hours a day.

Q. Which meant that you no longer had to work on Saturday, is that correct? A. Yes.

Q. (By Trial Examiner Bennett): Coming back to the talk you had on September 24, with Mr. Slayden, you said he asked you the night before to drop in? A. Yes, he did.

Q. What time did you drop in?

A. I went in at 8 o'clock, but I asked him, I told him I was ready to talk to him and he said he wasn't ready yet and I asked him what time would be convenient and he said 8:30, so I went back at 8:30. [173]

Q. Then you had your talk at 8:30?

A. Yes.

Q. (By Mr. Bruckner): Did you get any Christmas bonus this past year? A. Yes.

(Testimony of Ruthe Jensen.)

Q. Do you know if the other girls got it?

A. Yes, they did.

Q. They did?            A. Yes, they did.

Q. Again, directing your attention to Saturday, September 26, did you get a telephone call from Carrie Monroe that day?

A. Yes. Well, I usually answer the phone downstairs if the foreman doesn't answer it, and so I answered it and she was on the line.

Q. Did you recognize her voice?

A. Yes.

Q. About what time was this?

A. It was about 11, I imagine. You see, I stay an hour later than the other girls do to check up, we do the checking up of the sheets at night.

Q. What did she say to you and what did you say to her at that time?

A. She just told me that the other girls could go ahead and go on home because the union office was closed and we wouldn't be able to withdraw our slips because it would have to come to some [174] kind of a vote. So the rest of us didn't go down.

Q. Were you going to go down?

A. Yes, I was.

Q. You were going to go down in company with other girls?            A. Yes.

Q. Why?

A. Well, some of the men, they said all the men had withdrawn and that they would lose, I mean, they wouldn't gain by the union because they would be getting less hours. And I thought, we

(Testimony of Ruthe Jensen.)

thought, I thought well, it wouldn't really be much for me, a lot of the girls had withdrawn, there was only a few of us left, not enough to do any good, so I thought I might as well go out, too.

Q. Had you made any attempt to withdraw before that day?      A. No.

Q. (By Trial Examiner Bennett): Had any of the others, to your knowledge, attempted to withdraw before that Saturday?      A. No.

Q. (By Mr. Bruckner): I will again direct your attention to this conversation you had on September 24, whatever that day was, with Mr. Slayden, and ask you if you can recall whether you were asked who had, who was in the union or who had signed up.      A. Yes. And Mr.—

Q. (Interrupting) Who asked you?

A. Mr. Slayden. [175]

Q. What did he say?

A. He asked me if, who, that he knew who had signed in the union, signed up with the union, and I told him no he didn't because I didn't, because the union man had our names, and he said yes, he did, that Bill had given him the names the night before.

Q. Yes, I understand that, but did he ask you who had signed?      A. No.

Q. (By Trial Examiner Bennett): In other words, did he ask you a question rather than making a statement?      A. No.

Mr. Bruckner: I see.

Q. (By Mr. Bruckner): About how many girls

(Testimony of Ruthe Jensen.)

had you decided to go down to the union hall with?

A. I think there were four of us going down.

Q. To withdraw?            A. Yes.

Mr. Bruckner: That is all.

### Cross Examination

Q. (By Mr. Eberle): When did you start working for the Idaho Egg Producers?

A. I think about January 3, 1946.

Q. And you have worked steadily since that?

A. Not steady, no. I quit a couple of summers when my children were young. [176]

Q. At times of the year candling sloughs off, is reduced?            A. Yes.

Q. And in prior years, whenever that occurred, whenever that occurs, you don't work Saturdays?

A. Yes, we worked our Saturdays, yes.

Q. Did you?

A. Yes. That was almost——

Q. (By Trial Examiner Bennett) Almost what?

A. Almost a must, that we put in our Saturdays.

Q. (By Mr. Eberle): Were you working there at all at times when there wasn't enough eggs to candle?            A. Yes.

Q. What would they do then, lay off some of the help?            A. Yes.

Q. Some of the help would be laid off?

A. Yes.

Q. (By Trial Examiner Bennett): How about the others, who were not laid off, would they work

(Testimony of Ruthe Jensen.)

Saturdays?        A. What do you mean?

Q. When you said at times some of the help would be laid off.

A. Well, there would be the majority, I mean, like if there was just enough eggs for three girls, then the oldest three girls would work.

Q. Would they work Saturdays?

A. They would work the Saturdays, or whatever day it was, as [177] long as they had the eggs——

Q. (By Mr. Eberle): There would just be a few old-timers?        A. Yes.

Q. (By Trial Examiner Bennett): When you said some people would be laid off——

A. Just like if we only had enough eggs to do until Tuesday, well, then they would be laid off Friday and Saturday, until Tuesday.

Q. And at times, when there wasn't enough work, just some people would work on Saturdays and——

A. They would just work what time they could get.

Mr. Bruckner: I think there may be a misunderstanding on that.

Trial Examiner Bennett: I thought she originally testified for me that the help would be laid off and the remainder would work the full week, including Saturdays. And then I thought she testified for Mr. Eberle that only some of the people would work on Saturday.

Q. (By Trial Examiner Bennett): Now would you clarify that for us in your own words?

A. Well, now, like if there was five of us work-

(Testimony of Ruthe Jensen.)

ing and we had been working every day and when it came down to near the end of the eggs and there wasn't too many, the ones who didn't have the seniority would be laid off until those eggs had been completed and the next lot—we have pools, we open and close a [178] pool, and that is on a Tuesday and our eggs have to work according to that. I mean, in other words, if we did eggs on a Tuesday, then we wouldn't do the following lot of eggs until the next day. So if we ran out at two o'clock we would all go home at two o'clock.

Q. (By Mr. Eberle): If the eggs ran out so there wasn't enough on Saturday, they would just let those work on Saturday that there was work for, they would stay on and the rest would be dropped off?

A. Yes, the ones who had seniority, yes.

Q. Let's go on to this conversation you had. I guess it was on Thursday, was it, or on Friday?

A. I don't remember when it was.

Q. The one that Mr. Slayden asked you to come up to talk to him.      A. Yes?

Q. When you went up there, the first thing he said was, wasn't it, "What have I done wrong, that you have gone and gotten the union, what haven't I done right?"

A. He just asked me what made me do what I did. And I didn't answer him and pretty soon he said he found out from different sources that I had been one of the main ones.

Q. But he told you then that Mr. Hoffman had



(Testimony of Ruthe Jensen.)

hold him all about the union?      A. Yes.

Q. So he knew all about it, then, at that time?

Q. And about these blueprints, what he told you was that if wages went up to a point where it was uneconomical to use labor and they had to use machines, they would use the machine?

A. Well, he didn't say it in them words.

Q. But that was the substance of his statement?

A. He just said he had this machine that would, if he had to install it, he would.

Q. That was because if the wages got so high that they had to use machinery, he had plans for it?

A. I imagine that is what he meant.

Q. You knew about that they had been planning——

Mr. Bruckner (interrupting): Well, now——

Trial Examiner Bennett: When you say you imagine that is what he meant, we want you to confine yourself to what he said.

The Witness: Well, I didn't take it that way right then. I thought it meant that he would install it.

Q. (By Mr. Eberle): You knew that they had been planning on this for several years, didn't you?

A. Yes, I had even seen the machine in pictures.

Q. For several years they were planning on it, whenever it was economical or feasible?

A. Yes. [180]

\* \* \* \* \*

Q. (By Trial Examiner Bennett): Do you know

(Testimony of Ruthe Jensen.)

that they were planning on it in such time as it was economically feasible, or don't you know?

A. I don't know if they were going to or not.

Q. (By Mr. Eberle): They had plans for it, you had known that for several years, the question was?

A. Yes, I knew that.

Q. (By Trial Examiner Bennett): Do you know specifically what their plans were, that involved that machine?

A. I think it was the machine——

Q. Were you told what they were?

A. No. I just saw pictures.

Q. (By Mr. Eberle): Well, you saw them, you were told about them, and you looked at the pictures and so forth?      A. Yes.

Q. Now, you said that some of the employees didn't want to belong anyway. Who were they?

Mr. Bruckner: I recall no such testimony, sir. I object to that.

Q. (By Mr. Eberle): Did you say that some had decided they did not want to belong anyhow?

A. No.

Q. What did you say about that?

Trial Examiner Bennett: She said she didn't make the [181] statement.

A. I don't understand.

Q. (By Mr. Eberle): Were there some that didn't want to belong even in the first instance?

A. I don't think so. We didn't force them to it. They said later that they didn't know why they did it, but they weren't forced into signing it.

(Testimony of Ruthe Jensen.)

Q. When they told you that they didn't know why they did it, at that time did they want to get out?      A. Yes.

Q. When was that?

A. I think it was Saturday.

Q. They told you they never wanted to get it in in the first place?

A. They didn't know why they did.

Q. (By Trial Examiner Bennett): They didn't know why they had gotten in in the first place?

A. Yes.

Q. (By Mr. Eberle): What were these employees told when they were asked to sign these cards?

A. Well, I just told them what I, why I signed and I just told them I figured I was going to better myself and it sounded like a pretty good deal, so they were going to do it, too.

Q. What did they tell you when you joined?

A. Well, I just told them that I——

Q. (Interrupting) No. I mean, what did they tell you when [182] you joined?

A. Well, I would probably get more pay. That is what it was for.

Q. Did they tell you how many had signed when you joined?      A. No.

Q. Did they say anything about initiation fees when you joined?      A. Yes.

Q. What did they say?

A. That I wouldn't have to pay the initiation

(Testimony of Ruthe Jensen.)

fee, just the first month's dues, but the ones who came in after would pay the initiation fee.

Q. Now, when Mrs. Monroe phoned back she said that the office was closed and you couldn't withdraw because the matter would have to come to a vote? A. Yes.

Q. Isn't that the same thing they told you when you joined, that the matter, that this was simply to sign these papers and then the matter would have to come to a vote? A. Yes.

Q. That is what they told you when they asked you to join? A. Yes.

Q. (By Trial Examiner Bennett): When Mrs. Monroe called back on Saturday, had she spoken to somebody? A. I think so.

Q. You don't know who? [183]

A. No, I don't. I probably heard, but I don't remember who.

Q. (By Mr. Eberle): Did she say she had talked to Mr. Lott?

A. I don't remember who she had talked to. She said that she had talked to somebody.

Q. And she, and they told you you couldn't withdraw because the matter, that the matter would have to go to a vote? A. Yes.

Q. When you signed did you read what you were signing?

\* \* \* \* \*

A. You mean that little slip I got?

Q. (By Mr. Eberle): Yes.

A. That would give me a vote?

(Testimony of Ruthe Jensen.)

Q. Yes.           A. Yes, I read that thing.

Q. And you were told then at that time that you would sign and that would set the thing in motion so that there would be a vote on it?

A. Yes.

Q. Did you go back and tell Mr. Slayden that the girls wanted to withdraw? [184]

A. Yes, I did.

Q. Let's see if we get the sequence of it. You had this talk with him and when you had this talk with him he told you about these plans and so forth and then about these wages and so forth, what he said to you was "Well, now, so far as the bonus and the wages, that would all depend upon a contract with the union"? Isn't that what he said?           A. Yes.

Q. There was no assurance of what would be in this contract with the union?           A. Yes.

Q. Isn't that what he said about bonus and hours and wages and everything, that would depend upon the contract, isn't that what he said to you?

A. Yes.

Q. And that was the substance of that conversation about the wages and hours and Saturdays and so on, bonuses, it would all depend upon how the contract was finally written?           A. Yes.

Q. Now, then, he said—

Trial Examiner Bennett (interrupting): This is when, on the 24th?

Q. (By Mr. Eberle): On the 24th, when you went to his office?           A. Yes.

(Testimony of Ruthe Jensen.)

Mr. Eberle: Yes. [185]

Q. (By Mr. Eberle): Then he said, "However, it's up to you, no matter what I think about it it is up to you whether you want to join or not"? Didn't he say that?      A. Yes.

Q. Then you went downstairs and then you went back to him, didn't you?

A. I went back to him after he had come down and talked to us.

Trial Examiner Bennett: Just a moment. I am interested in the sequence, too.

Q. (By Trial Examiner Bennett): You said you went back and spoke to him after he had come down and talked to, spoke to, you?

A. Yes. That was to us first, yes.

Q. That was on Saturday?

A. Well, that wasn't on the same day that I talked to him, I didn't withdraw.

Q. (By Mr. Eberle): You didn't withdraw that day?      A. No, not until Saturday.

Q. Then you went back on Saturday to him, to his office?

A. Yes, after he had come down and we had talked about it. We had been talking all the time, I guess.

Q. (By Trial Examiner Bennett): What happened when you went back to see him on Saturday?

A. I was crying and I just told him, I says, "The majority of them are going to sign", and I says, "And I am ready to withdraw, too", and I says, "They will let you take them over." [186]

(Testimony of Ruthe Jensen.)

And he said, "O. K." He was talking to somebody when I was up there, so I didn't go in his office.

Q. This was after his speech to the group?

A. Yes.

Q. (By Mr. Eberle): You said that the majority wanted to withdraw? A. Yes.

Q. What did he say then?

A. I told him and he thanked me and then he went downstairs.

Q. Isn't it a fact, Mrs. Jensen, that after you talked to Mr. Slayden on the 24th—that was Thursday—between then and Saturday the girls had discussed this pretty thoroughly, hadn't they?

A. Yes, but not in the open, I mean, just——

Q. That is right.

Mr. Bruckner: I think that the witness is entitled to a chance to explain the matter and to complete her answer, Mr. Examiner.

Trial Examiner Bennett: She did not finish her answer.

Q. (By Trial Examiner Bennett): Will you do that?

A. We talked back and forth. We didn't go from one to the other. I mean, in other words, there seemed to be two sides to it. Until it was brought to a head on Saturday, that is.

Q. (By Mr. Eberle): You mean some of them wanted to withdraw? A. Yes.

Q. That was between Thursday and Saturday?

A. Yes.

Q. And, in these discussions you had during

(Testimony of Ruthè Jensen.)

those two days, there some of them wanted to withdraw?      A. Yes, they did.

Q. And there were discussions back and forth?

A. Yes.

Q. And then they finally all decided they wanted to withdraw on Saturday?      A. Yes.

Q. Now, a lot of them told you, didn't they, that because part of them wanted to withdraw, unless they were all in, there was no use being in, isn't that true?      A. Yes.

Q. And part of them that wanted to withdraw between Thursday and Saturday, if they didn't want to withdraw the others wouldn't either?

A. That is right.

Mr. Bruckner: Objection.

Trial Examiner Bennett: Let's have the question read back.

(Last question and answer read.)

Mr. Bruckner: I move to strike.

Trial Examiner Bennett: On what basis?

Mr. Bruckner: On the basis that it is ambiguous and confusing and it is not a proper question.

Trial Examiner Bennett: It is ambiguous to me, so I will [188] grant the motion to strike.

Mr. Eberle: I will put it this way——

Q. (By Mr. Eberle): Prior to Saturday there were some of the girls who wanted out?

A. Yes.

Q. And some who were in doubt about it?

A. Yes.

Q. And on Saturday, the reason that those who



(Testimony of Ruthe Jensen.)

were in doubt withdrew was because part of them wanted to withdraw and unless they were all in, why, they didn't want to be in either, is that right?

A. Maybe I don't understand——

Trial Examiner Bennett: You don't understand the question?

The Witness: No, I don't.

Q. (By Mr. Eberle): Originally practically all of the employees said if all of them went in they would go in, too? A. Yes.

Q. In other words, they didn't want part to be in and part to be out? A. Yes.

Q. Isn't that the basis on which a lot of them went in?

A. Well, I think so, but they still knew what they were doing.

Trial Examiner Bennett: We are only interested in what you heard and observed, not what you think was going on in their minds, so you take your time and answer these questions [189] carefully.

Q. (By Mr. Eberle): You knew that some of them said, "If they will all go in, we will go in"?

A. Yes.

Q. Between Thursday and Saturday some of them wanted to withdraw, didn't they?

A. Yes.

Q. And you knew the men wanted to withdraw, didn't you? A. Not——

Trial Examiner Bennett: Finish your answer.

Q. (By Mr. Eberle): You didn't know about

(Testimony of Ruthe Jensen.)

the men between Thursday and Saturday, but you knew some of the women wanted to withdraw?

A. Yes, that is right.

Q. When did you learn about the men?

A. Saturday morning.

Q. What time Saturday morning?

A. When I, I think I was talking to Mr. Slayden himself and he said that the men had all decided they were going to get out because they weren't going to be bettering themselves.

Q. (By Trial Examiner Bennett): Was this before or after Mr. Slayden made a speech to the group?      A. After.

Q. (By Mr. Eberle): What did Mr. Hoffman say that morning, before this meeting with the group? [190]

A. I didn't talk to Mr. Hoffman. That was the day I talked to Mr. Slayden in his office.

Trial Examiner Bennett: Thursday morning or Saturday?

Mr. Bruckner: That was on Thursday.

Q. (By Mr. Eberle): Did Hoffman say anything about it then, about the men withdrawing?

A. No. He was just, he just said he was sorry he had ever had anything to do with the union.

Q. I see. At that time?

A. Yes. But he didn't mention——

Q. (Interrupting) All right.

Mr. Bruckner: Let's have the answer.

A. (Continuing) ——any of the men.

Trial Examiner Bennett: Any of the men?

(Testimony of Ruthe Jensen.)

The Witness: Yes. [191]

\* \* \* \* \*

Q. (By Mr. Eberle): Mrs. Jensen, did some of the women say there on Saturday that as long as part of them were withdrawing they wanted to withdraw, too? A. Yes.

Q. And even prior to that time some of the employees told you unless they were all in that they didn't want to be in? A. Yes, they did.

Q. Let me ask you, Mrs. Jensen, whether anything that Mr. Slayden said to you had anything to do with your withdrawing.

A. No. I don't think so. I mean, I just didn't, well, I was in so deep anyhow, and I had been one of the main ones, so I just figured well, I would get out.

Mr. Eberle: That is all.

Mr. Bruckner: I have some redirect.

#### Redirect Examination

Q. (By Mr. Bruckner): Now, Mrs. Jensen, going back to this talk on Thursday, September 24, with Mr. Slayden—— A. Yes?

Q. You know, that was the talk when Hoffman came up and [192] started crying? A. Yes.

Q. Think carefully about this. Did Mr. Slayden actually say anything about contracts during that time, that whether you would have a bonus depended upon what kind of a contract was written?

A. Yes, he did. He said it depended on what kind of a contract that the union, or if we had any

(Testimony of Ruthe Jensen.)

contract with the union, whether we got these things.

Q. Did he say whether there would be a contract with the union?      A. No.

Q. Did he say anything about under what conditions the bonus might be taken away?

A. Only if the union came in and it wasn't—

Q. I see.

Trial Examiner Bennett: Just a moment.

Q. (By Trial Examiner Bennett): It wasn't what?

A. It wasn't—well, I don't know how to put it. No. He just said if anything about the union came in—

Q. The bonus would not be paid under what circumstances, now?

A. Well, if the union came in, because it would have to be wrote up in a contract that a bonus would have to be paid and that it may not even be in.

Q. (By Mr. Bruckner): I see. Before this talk with Mr. Slayden had there been any talk among the employees about withdrawing [193] from the union, before you had this talk with Mr. Slayden?

A. No.

Q. Did these discussions among the employees about withdrawing from the union start after you told them what Mr. Slayden had told you?

A. I think so, yes.

Q. And were any of the employees whom you told about this conversation with Mr. Slayden

(Testimony of Ruthe Jensen.)

scared of losing their jobs as a result of what you told them?      A. Yes.

Q. Did that enter into their discussions about withdrawing from the union?

A. I think they assumed that way, because I heard it.

Q. Is that what they said?      A. Yes.

Q. Did that factor also play a part in the decision of the employees to withdraw after the speech of September 26, you know, the Saturday talk?

A. Uh-huh.

Q. What is your answer? Did you understand my question?      A. No, I didn't.

Q. I see. Were they afraid of losing their jobs or losing their bonus as a result of the speech of Mr. Slayden's on September 26, that Saturday?

A. Well, I think they were because they didn't know whether [194] we would get the union in or not.

Q. Did they say that to you?

A. Yes, they did.

Q. Was that one of the factors or the primary reason——

Mr. Bruckner: Strike that.

Q. (By Mr. Bruckner): Was that the reason that they decided to withdraw at that time?

A. I really don't know.

Trial Examiner Bennett: It seems to me we have devoted sufficient time to this witness on the September 24—September 26 period.

Q. (By Mr. Bruckner): Did you state that it

(Testimony of Buthe Jensen.)

was Mr. Slayden who told you after the Saturday, September 26, meeting that the men had decided to withdraw?      A. Yes.

Q. Did he tell you how he knew?      A. No.

Q. Did I ask if you got paid for that time off before?

A. You didn't ask me, but I did get paid.

Mr. Bruckner: Let's make sure that the record will read correctly here.

Q. (By Mr. Bruckner): Did you get paid for that time off up until Saturday noon on September 26?      A. Yes.

Q. Did the other girls get paid for that time off, too? [195]

A. To my knowledge, they did, yes.

Mr. Eberle: In deference to the Examiner's comment, I would still like to clarify that one answer of the witness.

### Recross Examination

Q. (By Mr. Eberle): Your answer that you told the group what Mr. Slayden told you, your opinion was that they were scared after you talked to them?

Mr. Bruckner: Objection. [196]

\* \* \* \* \*

Q. (By Trial Examiner Bennett): Did you hear them comment or discuss the fact that they might be scared? That is the question, I think.

A. Yes, I did.

Q. (By Mr. Eberle): With reference to what

(Testimony of Ruthe Jensen.)

you told them at that time, did you tell them that Mr. Slayden told you that so far as hours and wages and bonuses and so forth, it would all depend on the union contract?      A. Yes, I did.

Q. The matter of negotiations?      A. Yes.

Q. Did you tell them that he told you it was entirely up to them whether they should join the union or not?      A. Yes, I did.

Q. What else did you tell them?

A. That is all I told them. I told them just the truth, what he said.

Q. (By Trial Examiner Bennett): As I understand you told them exactly what Mr. Slayden had told you?      A. Yes, I did.

Q. (By Mr. Eberle): Who made this comment to you about being scared?

A. A few of the girls.

Q. Well, who?

A. Do I have to say? [197]

Q. Yes.

A. Carrie Monroe—let's see—I think Janet Stoddard—I can't think of anyone else.

Q. That is the only two, then?      A. Yes.

Mr. Eberle: That is all.

Q. (By Trial Examiner Bennett): You testified that after you left Mr. Slayden on the 24th you went downstairs and told the girls everything that had taken place there?      A. Yes.

Q. Did you tell them about Hoffman coming in?

A. No. I think one of the men told us that Mr. Hoffman had been in.

(Testimony of Ruthe Jensen.)

Q. Now, you testified that Hoffman came in and said, admitted that he had given Mr. Slayden the names and he was sorry he started it, I mean, and he was crying?

A. Yes. But we heard it from somewhere. We knew about it before I went upstairs.

Q. You also said that Mr. Slayden said he knew the names of those who had signed?      A. Yes.

Q. When you came downstairs and spoke to the girls did you or did you not tell them what Mr. Slayden had said in that respect?

A. No, I don't think I did because I didn't think he had all the names, because if he had all that was at the meeting, they [198] wasn't all there, and I didn't think he had them all.

Trial Examiner Bennett: That is all I have.

Mr. Bruckner: I have one more question.

#### Further Redirect Examination

Q. (By Mr. Bruckner): Did you tell the girls at that time what Mr. Slayden had told you about the machine, too?      A. Yes, I did.

Mr. Bruckner: That is all.

#### Further Recross Examination

Q. (By Mr. Eberle): Just exactly as you had answered my question?

Mr. Bruckner: Objection.

Trial Examiner Bennett: I am inclined to sustain the objection to that.



Anything further of the witness?

(No response.)

Trial Examiner Bennett: You are excused. [199]

\* \* \* \* \*

Tuesday, January 26, 1954

JANET STODDARD

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Bruckner): Will you state your name and address, please?

A. Janet Stoddard. I live at 3549 Valley Road.

Q. Are you an employee of Idaho Egg?

A. Yes.

Q. How long have you been working there?

A. Well, I started in, January '51 is when I really started.

Q. Did you work continuously up until today or yesterday?

A. No. I worked off and on. I didn't work steady.

Q. What is your job?

A. I candle eggs.

Q. Were you working for the company around in September, or the month of September, 1953?

A. '53?

Q. Yes. That is, last year.                      A. Yes.

Q. You are one of those who signed a union authorization card?                      A. I did.

(Testimony of Janet Stoddard.)

Q. I will ask you, Mrs. Stoddard, if you were working at the plant on Saturday, September 26. Do you remember that day?

A. I remember on Saturday, but I don't remember the date. [203]

Q. Well, we will fix the date just a bit later. Do you recall a day when you were working in the candling room and Mr. Slayden spoke to several of the girls down there?

A. Yes. He came down on a Saturday, on Saturday.

Q. Well, this, it just so happens, was September 26. Do you remember which girls were there at the time?

A. I don't remember every one, but I think most of them was there.

Q. Well, the girls who work in the candling room, in the basement, is that correct?

A. Yes.

Q. What do you remember of Mr. Slayden's talk to the girls? Do you remember what he said?

A. Well, he came down and asked us, "If any of you girls want to go over and withdraw your slips you can go and I will furnish the car. The ones who don't want to go don't need to go."

Q. Did you go?      A. Yes.

Q. Did you take your own car?      A. Yes.

Q. About what time did you leave?

A. I don't remember the exact time.

Q. It was before the end of the work morning, though, wasn't it?

(Testimony of Janet Stoddard.)

A. It was before noon. [204]

Q. (By Trial Examiner Bennett): How late were you supposed to work that day?

A. Until noon.

Q. (By Mr. Bruckner): Who went with you, if anybody did?

A. Lena Panter and Carrie Monroe and Nina Cordell and myself and Zina Jensen, my sister.

Q. I see. Where did you go?

A. We went over to the union hall.

Q. Was anybody there?

A. There was nobody there.

Q. Did anybody make any attempt to contact the union representative?

A. Carrie Monroe.

Q. She called him, did she? A. Yes.

Q. (By Trial Examiner Bennett): At his home?

A. Well, I presumed it was at his home. I don't know.

Mr. Bruckner: I will have Mrs. Monroe testify in just a moment.

Q. (By Mr. Bruckner): Were you paid for up until noon Saturday, that day?

A. I couldn't say because I don't know.

Q. Do you recall what else Mr. Slayden said during the course of his talk to you girls in the candling room?

A. At that time, that is all I remember of him saying. [205]

Q. Do you recall whether anything was said

(Testimony of Janet Stoddard.)

about coming to him instead of going behind his back to the union?

A. Well, yes, I recall of him saying that at another time.

Q. Would you tell me when he said that, please, if you can remember?

A. I don't remember whether it was earlier that morning or another day, but he told us, he asked us why we didn't come to him with what we wanted instead of going around behind his back, which we did.

Q. Yes, ma'am. Which you did what?

A. We went around behind his back and talked.

Q. Was this before that Saturday or after that Saturday?      A. It was before.

Q. Where did this conversation take place?

A. In the candling room.

Q. (By Trial Examiner Bennett): Was this to all the girls?

A. Yes, he came in and asked us.

Q. (By Mr. Bruckner): Did he mention the union at that time?

A. Not that I remember of.

Q. (By Trial Examiner Bennett): What were you supposed to have done behind his back?

A. Well, we went around and we was deciding to join the union and he didn't know anything about it. And he asked us why we didn't come to him if we wanted higher wages, why we didn't come to him and tell him. [206]

Q. (By Mr. Bruckner): Did he mention Satur-

(Testimony of Janet Stoddard.)

days off at that time, too?      A. No.

Q. Did he mention Christmas bonuses at that time?      A. No.

Q. Did he mention Saturdays off at any time?

A. I didn't hear him.

Q. Had you had Saturdays off up until September 26?      A. Not when I worked there.

Q. Did you receive Saturdays off after September 26?

A. I think it was after that. But I don't know when. I can't remember.

Q. (By Trial Examiner Bennett): Whenever it was, did you after that time receive Saturdays off?      A. Yes.

Q. I don't even remember. It's been too long ago.

Q. Did you want Saturdays off?

A. Yes. I have always liked to have Saturdays off.

Q. Did you ever tell Mr. Slayden you wanted Saturdays off?      A. I never told him.

Q. Did you ever tell Mr. Talbot that you wanted Saturdays off?      A. Mr. Who?

Q. Talbot. Do you know him?

A. No, I don't.

Q. You just started having Saturdays off without anything being [207] said by Mr. Slayden or anyone connected with the company?

A. As far as I am concerned, I don't remember, to tell you the truth.

Q. (By Mr. Bruckner): During the course of any of his talks to you was anything said about

(Testimony of Janet Stoddard.)

what could possibly be done for the employees if the employees had come to him instead?

A. No.

Q. I am not trying to put words in your mouth. I just want to know if that refreshes your memory.

A. No. He said we could have probably worked something out if we would have come to him.

Q. (By Trial Examiner Bennett): You could have probably worked something out?

A. If we would have come to him, but he didn't say anything that could have been done. That is what he said that day he came down there.

Q. (By Mr. Bruckner): Do you recall whether anything was said about the fact that you could bargain with him without the union?

A. No. He said, he might have mentioned bargaining, but he said we could have bargained or we could have worked something out "if you would have come to me instead of going around behind my back as you did".

Q. And you think you went behind his back?

A. Well, we did.

Q. Is that your opinion? [208]

A. Yes, it is. He didn't know anything about it.

Q. Did you return to work on that Saturday after you went down to the union?

A. I did not.

Q. At the time that Mr. Slayden said, 'If any of you girls want to withdraw your slips I will furnish transportation', did you tell Mr. Slayden anything about taking your own car or that you would

(Testimony of Janet Stoddard.)

take your own car?           A. I didn't.

Q. (By Trial Examiner Bennett): How soon after he spoke to you did you leave that Saturday?

A. Well, I don't remember at the time because we had to finish our eggs that we was on.

Q. You had to finish your eggs?

A. He told us to finish what we was doing. Some of us took longer than others because some of us had more eggs to do than others did.

Q. You finished what you were doing and then went away?           A. That is right, yes.

Mr. Bruckner: Nothing further.

### Cross Examination

Q. (By Mr. Eberle): Now, you do remember Mr. Slayden coming down on this Saturday and saying that if anyone decided to withdraw that he would furnish the transportation?

A. Yes. He said it. [209]

Q. Did he say anything else at that time?

A. I don't remember of him saying anything else.

Q. Now, you do remember another time he came down before that?

A. Yes. But I don't remember what——

Q. Do you——

Mr. Bruckner: Let's have an answer, please.

Q. (By Trial Examiner Bennett): But you don't remember what?

A. I don't remember the time or the day, but I remember it was before that.

(Testimony of Janet Stoddard.)

Q. (By Mr. Eberle): You don't remember whether it was a few days before or whether it was on Saturday morning?      A. No, I don't.

Q. These were the only two times he ever came down?

A. That is the only times I can think of.

Q. Now, the first time he came down, Mrs. Stoddard, didn't he at that time say, "Now, let's stop all this whispering and talk and go back to your booths and get to work"?

A. He did. That is the way I remember it.

Q. Did he say anything else at that time?

A. Well, that is the time I remember of him asking us why we didn't come to him.

Q. Yes. He said, "Why didn't you come to me?" and he said, "Get back to your booths and go to work"?      A. Yes.

Q. Did he say anything else? [210]

A. I don't remember of him saying anything else.

Q. That was the only thing he said to you, as far as you remember?      A. That is all.

Q. Now, I didn't get who went in your—it was your car that you used that Saturday?

A. Yes.

Q. It was you and Mrs. Monroe and your sister?

A. And Nina Cordell and Lena Panter.

Q. And Lena Panter. Now, did anybody else go, outside of your car?

A. I don't think so. I don't know.



(Testimony of Janet Stoddard.)

Q. When Mrs. Monroe went to call Mr. Lott then, did she come back to you, at the car?

A. We was in there. We was in the building.

Q. Oh, you went in the building?

A. Yes. We all went in.

Q. Then what did she say about Mr. Lott? What did he say? A. Well——

Q. (By Mr. Bruckner—interrupting): Were you speaking on the phone? A. She was.

Q. (By Mr. Eberle): What was said?

A. She told us that he said that we couldn't do anything until it came to a vote. [211]

Q. When Mr. Slayden came down that Saturday and said that if anybody wanted to go they could have his car, all you girls had already made up your minds to withdraw? A. I had.

Q. I beg pardon?

A. I had. And, as far as I am concerned, the girls that rode with me had.

Q. They made up their minds to withdraw prior to that time? A. Yes.

Q. You had discussed it that morning?

A. Well, I don't remember of discussing it, but I knew I had.

\* \* \* \* \*

Q. (By Mr. Eberle): Well, now, Mrs. Stoddard, your desire to withdraw, as you say, you made up your mind, was that due to any promise or threat by Mr. Slayden? A. No.

\* \* \* \* \*

Q. (By Mr. Eberle): Did you ever talk to Mr.

(Testimony of Janet Stoddard.)

Slayden excepting on these two occasions?

A. That is the only time I remember of talking to him. When he came down.

Q. Did you ever talk to Mr. Talbot about any of these matters.      A. Talbot? No. [212]

Q. And you made up your mind without any influence from anybody?      A. I did.

\* \* \* \* \*

Q. (By Mr. Eberle): Handing you the exhibit marked as 8-F, Mrs. Stoddard, I will ask you if that is your signature?      A. Yes.

Q. Is the rest of the writing on there your handwriting?      A. No.

Q. That is the only handwriting there that is yours?

A. (Witness shakes head affirmatively.)

Q. What?      A. Yes.

Q. Who came to you and asked you to sign that?      A. Ruthe Jensen. [213]

Q. Ruthe who?

A. Jensen, and Erma Herzinger.

Q. Ruthe Jensen and Erma Herzinger. And did you read it at the time?

A. I don't remember of reading it.

Q. What did they say to you?

A. Well, she asked me if I was going to or if I wasn't. Ruthe asked me that and Erma asked me that.

Q. (By Trial Examiner Bennett: What did you say?      A. I hadn't made up my mind.

Q. (By Mr. Eberle): Then what happened?

(Testimony of Janet Stoddard.)

A. Well, they asked me some more.

Q. (By Trial Examiner Bennett): Did they leave the slip with you?

A. Erma left it with me about two or three hours before I signed it.

Q. (By Mr. Eberle): All right. Now, then, when they came back, didn't they tell you that if you didn't sign you would have to pay \$25 later on for initiation fee?

A. They didn't tell me that.

Q. They didn't tell you that. Well, didn't they tell you that everybody else had signed?

A. They did.

Q. And you were the last one?

A. They said they needed two more signers when they told me. [214]

Q. But everybody else in the plant had signed?

A. All men had signed, they said. I don't remember whether it was Ruthe or Erma that told me, but one of them did.

Q. What else did they say?

A. That is all I remember. They didn't tell me much of anything.

Q. Did they say anything about the matter going to a vote?      A. The what?

Q. Did they say anything about it going to a vote, that this was to let it go to a vote?

A. Well, I heard it two different ways. I heard it once that when the majority signed those slips we was automatically in the union and then another

(Testimony of Janet Stoddard.)

time I heard that it had to go to a vote. And I don't remember who told me that.

Q. Now, isn't it a fact, Mrs. Stoddard, that the two times that Mr. Slayden talked and you heard him, he said it was entirely up to the employees whether they wanted to join the union or not?

A. He did.

Q. It was their choice to make, it would make no difference to him?

A. That is what he said.

Mr. Eberle: You may inquire.

### Redirect Examination

Q. (By Mr. Bruckner): At the same time he made these statements [215] that it made no difference to him, didn't he also say that he didn't like the idea of the employees going behind his back, he didn't think it was right?

A. Well, I believe he said it at that time, asked us why we didn't come to him.

Q. And what did any of the employees say?

A. Nobody said anything.

Q. Now, you had signed the card—let me ask you this—you say you had decided to withdraw before Saturday, is that correct?

A. That is right.

Q. When did you decide to withdraw?

A. Well, right after I signed it. I didn't think it would benefit us by it, and that is the reason I waited so long.

Q. But you signed it on September 22?

(Testimony of Janet Stoddard.)

A. I signed it the day that they had their union meeting, that night.

Q. Yes, ma'am. And did you hear that Mr. Slayden knew who had signed the cards?

A. No. I don't remember that.

Q. Did you hear if Mr. Slayden knew——

Mr. Bruckner: Strike that.

Q. (By Mr. Bruckner): Did you hear that somebody had told Mr. Slayden who was at the union meeting? A. I heard it.

Q. When did you hear that? [216]

A. Well, I believe it was after he came down and asked us why we didn't come to him.

Q. (By Trial Examiner Bennett): That was the earlier talk, is that it? A. Yes.

Q. Did you hear who it was had told him?

A. I heard it was Bill Hoffman.

Q. (By Mr. Bruckner): Was that the day after you signed your card, do you remember?

A. No, I don't remember.

Q. Might it have been the day after you signed your card?

A. It could have been the day after or the day before, or the day before that. I don't remember when it was.

Q. The day before you signed it?

A. It could have been before or after.

\* \* \* \* \*

#### Recross Examination

Q. (By Mr. Eberle): Mrs. Stoddard, I thought maybe I had better inquire—now, on this Saturday

(Testimony of Janet Stoddard.)

morning did Ruthe Jensen come down and tell you what Mr. Slayden had talked with her about, or any [217] conversation that she had had with him?

A. I didn't hear her.

Q. (By Trial Examiner Bennett): Do you recall her coming down on an earlier occasion and speaking to you girls about a talk she had with Mr. Slayden?      A. I didn't hear her at all.

Q. (By Mr. Eberle): In other words, as far as you know, she didn't come down and talk to you?

A. As far as I know, I didn't hear her.

Q. You were there, weren't you, Saturday?

A. I was in the building, but I didn't hear anything.

Q. Were you down in your booth?

A. I don't remember just where I was. I don't know if I was in my booth or in where we had rest period. I don't remember just where I was.

Q. Do you remember the time you got back from the union hall, how near noon it was?

Mr. Bruckner: Got back where? She didn't return to the plant.

A. I didn't go back over there.

Q. (By Mr. Eberle): And you don't know what time it was, then, that you left the union hall?

A. I don't.

Q. How near noon would you say it was?

A. I thought it was around 11 o'clock or after. I don't [218] remember for sure.

Mr. Eberle: That is all.

Q. (By Trial Examiner Bennett): You said

(Testimony of Janet Stoddard.)

that you had heard that Bill Hoffman had told Mr. Slayden the names of those who had signed cards or attended the union meeting. Is that right?

A. That is right.

Q. Was there talk about that among the girls?

A. Well, I, all I remember of hearing is that he told——

Q. Where did you hear it?

A. Just down in the candling room. I don't remember who said it.

Q. One of the girls who worked with you?

A. I just heard it down in there. I suppose it was one of the girls. But, as far as I remember, that is where I heard it.

Q. (By Mr. Eberle): You have worked since '51, you say. Now, during those years have you worked at any time during the slack season when the girls didn't work on Saturdays?

A. I don't understand that, Mr. Eberle.

Q. Isn't the egg candling rather seasonal? You sometimes have a rush and then certain times of the year there isn't quite as much work?

A. Yes.

Q. Did you work during any of the periods when the business slacked off to a point where they didn't work on Saturdays?

A. I don't remember that, whether I worked on any Saturdays [219] or whether I didn't work on any Saturdays, at that time.

Mr. Bruckner: I have a question yet to ask.

(Testimony of Janet Stoddard.)

Further Redirect Examination

Q. (By Mr. Bruckner): As a matter of fact, Mrs. Stoddard, before you started getting your Saturdays off, isn't it true that your work period was six days a week, with five hours, or four hours, on Saturday?

A. I believe we was working seven hours a day at that time.

Mr. Bruckner: Yes, ma'am.

Q. (By Trial Examiner Bennett): Were you working five hours on Saturday?

A. Well, we was working from 7 in the morning until noon.

Q. (By Mr. Bruckner): That would be five hours, is that correct?      A. I suppose.

Q. And what shift are you on now?

A. We work from 8 till 4:30.

Q. Do you work on Saturdays?      A. No.

Q. Do you know how long this shift has been in operation, this 8 to 4:30?

A. I can't remember.

Q. Has it been in operation for the past two weeks?      A. Yes.

Q. It's been in operation all during the month of September, [220] I mean of December, hasn't it, ma'am?

A. I think so. But I don't remember the exact, I don't remember how long.

Mr. Bruckner: That is all.



(Testimony of Janet Stoddard.)

Further Recross Examination

Q. (By Mr. Eberle): Did you work there in 1952?

A. No. I didn't. I worked in '51—'52, yes. I started in '52.

Q. '51?

A. I started in '51 and then I worked again in '52.

Q. Did you have Saturdays off in '52?

A. I don't remember of it.

Mr. Eberle: That is all.

Q. (By Trial Examiner Bennett): You say you don't remember of it? A. I don't.

Q. (By Mr. Eberle): Does that mean you worked on Saturdays or you don't know?

A. I don't know. [221]

\* \* \* \* \*

CARRIE MONROE

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Bruckner): Will you please give us your name and address, Mrs. Monroe?

A. Carrie Monroe, 697 Park Avenue.

Q. Mrs. Monroe, you are here because I served a subpoena upon you, directing you to appear here today, isn't that right? [222] A. I am.

(Testimony of Carrie Monroe.)

Q. How long have you worked for the company, Mrs. Monroe?

A. It will be 11 years the 15th of February, this coming February.

\* \* \* \* \*

Q. (By Mr. Bruckner): You were working for the company on September 26, weren't you, that is, the Saturday that we are talking about?

A. I was.

Q. Do you remember Mr. Slayden coming down and speaking to several of the girls in the candling room?

A. He came down and asked us to please get to work because we were not doing our work.

Q. Yes, ma'am. And were the other girls there at the time, too?      A. Yes, sir.

Q. Do you remember, do you recall, what else he said? [223]      A. No.

Q. (By Trial Examiner Bennett): How long was he there?      A. A very few minutes.

Q. What would your best recollection, your best estimate, be?      A. Well, I couldn't say.

Q. You said a very few minutes. Does that mean two or three or more or what?

A. Well, it wasn't over five minutes at the most.

Q. (By Mr. Bruckner): Do you recall whether anything was said about withdrawing from the union if you wanted to?

A. He said we could if we wanted to and if we didn't it was up to us.

(Testimony of Carrie Monroe.)

Q. And can you tell me just how the subject came to be mentioned, what he said before that?

A. No, I can't.

Q. Do you recall whether anything was said before that?           A. No.

Q. You don't recall?           A. No.

Q. In any case, did you go down with Mrs. Stoddard in her car to withdraw?           A. I did.

Q. Was Zina Jensen with you?

A. Yes, she was.

Q. And Nina Cordell? [224]           A. Yes.

Q. And who was the other one?

A. Lena Panter.

Q. And about what time of the day was this?

A. I don't know.

Q. It was before noon, though, wasn't it?

A. Oh, yes.

Q. Could you give us an estimate of about how long before noon it was?

A. Well, I don't pay much attention to time. I just——

Q. Now, when you got down there you went down to the Labor Temple, the union hall?

A. I did.

Q. Was it open at the time?

A. No, not that office wasn't.

Q. So what did you do? Did you call anybody?

A. I called Mr. Lott.

Q. Mr. Clarence Lott?           A. Yes.

Q. Did you speak to him?           A. I did.

(Testimony of Carrie Monroe.)

Q. Now, tell me to the best of your recollection what he said to you and what you said to him.

A. I called him up and I told him I called him because we wanted to withdraw from the union and he said, "You are not in [225] the union until it comes to a vote."

\* \* \* \* \*

Q. (By Mr. Bruckner): What did you do then?

A. Well, we left. I called Mr. Slayden and told him that the office was closed and that it would have to come to a vote.

Q. Did you speak to Mr. Slayden or Mrs. Jensen?      A. I called to Mr. Slayden.

Q. Did you speak to Mrs. Jensen? Now, take your time. That is, Ruthe Jensen, did you speak to her?      A. No, I didn't.

Q. (By Trial Examiner Bennett): After you spoke to Mr. Lott on the telephone you telephoned Mr. Slayden?      A. I did.

Q. What was it, again, you told him?

A. That we couldn't withdraw until it went to a vote.

Q. What did he say?

A. He say, "All right."

Q. (By Mr. Bruckner): Do you recall what else may have been said during that conversation with Mr. Lott?

A. I think that is practically all that was said. To my knowledge, [226] it is.

Q. Do you recall anything being said about the authorization cards having been sent to the Na-

(Testimony of Carrie Monroe.)

tional Labor Relations Board with the petition?

A. No.

Q. You don't recall whether that was said?

A. No.

Q. Now, you say you spoke to Mr. Slayden. Did you ask for Mr. Slayden?      A. I did.

Q. Who answered the phone, do you know?

A. I don't know.

Q. Did Mr. Slayden answer the phone?

A. No.

Q. In any case, whoever did answer the phone was told by you that you wanted to speak to Mr. Slayden?      A. They were.

Q. (By Trial Examiner Bennett): Was this at the plant?      A. Yes.

Q. (By Mr. Bruckner): And Mr. Slayden then picked up the phone and spoke to you?

A. Yes.

Q. What was it you told him then?

A. I told him we couldn't withdraw from the union until it came to a vote. [227]

Q. Did you then return to the plant?

A. No. I went home.

Q. Now, Mrs. Monroe, you signed an authorization card, didn't you?      A. I did.

Q. Do you recall when you signed it?

A. Well, it was either just before the meeting or just after. I don't know for sure which.

Q. The meeting you are talking about is September 22, the September 22 meeting of the employees at the Labor Temple? Is that correct?

(Testimony of Carrie Monroe.)

A. Yes.

Q. I asked you if you signed an authorization card, but just to make sure that we understand what you mean I will show you a copy of an example, GC-7-A, and ask you if the card was similar to this card here?

A. No. It was a little, tiny card, just with the name on it, just a little slip (demonstrating).

Q. What did you understand that slip to be?

A. Well, the way I understood it, we was almost the same as in the union then.

Q. (By Trial Examiner Bennett): For whom did you sign it? Who asked you to sign it, if you remember?

A. I don't remember whether it was Ruthe Jensen or Erma Herzinger. I don't remember for sure which one. Maybe both of them. [228]

Q. (By Mr. Bruckner): What was the color of that slip, did you say?

A. I don't remember for sure, but it wasn't that large, I am sure. I don't think it was.

Q. Might it have been?      A. (No response.)

Q. Would you just take your time and examine this again?

Mr. Eberle: I thought this was the one you lost. Were there two Carrie Monroes?

Mr. Bruckner: No.

Mr. Eberle: Have you got it now?

Mr. Bruckner: No. The witness is being shown a slip to refresh her recollection. Not the slip that was lost, of course.

(Testimony of Carrie Monroe.)

A. It doesn't seem to me that is the same kind of a slip that the other one was.

Q. (By Trial Examiner Bennett): You understood the slip to be one to show that you were in the union?      A. Yes.

Q. And that is what you understood when you signed it?      A. Yes.

Cross Examination

Q. (By Mr. Eberle): This slip that you signed was about the time of the meeting?

A. Well, it was in the neighborhood of that time, yes.

Q. And it was Ruthe and who else—I didn't catch the other name?      A. Erma Herzinger.

Q. Herzinger?      A. Yes.

Q. What did they say to you when they gave it to you?

A. They asked me if I wanted to join the union.

Q. (By Trial Examiner Bennett): What did you say?

A. Well, I wasn't very interested.

Q. (By Mr. Eberle): Did they say anything to you about they had enough, a majority, and they were all in, or something like that?

A. They said the majority had signed.

Q. Had signed. Did they say anything to you about having to pay 25 bucks later on if you didn't sign?

A. No, but I always understood when you joined a union you had to pay initiation fees.

(Testimony of Carrie Monroe.)

Mr. Bruckner: I move to strike, sir, everything from "I understood" on.

Mr. Eberle: It may be stricken.

Trial Examiner Bennett: I would just as soon it stayed in, but if counsel jointly want it out, it may be stricken.

Q. (By Mr. Eberle): When you went home that morning, how near noon was it, Mrs. Monroe?

A. I believe it was almost noon or was noon.

Q. Do you know whether you were paid up to noon that day?      A. No, I don't.

Q. On prior occasions during the years you have worked there [230] have you finished your work sometime before noon on Saturdays?

A. Well, whenever we finish the lots of eggs, the lot of eggs, we are on, if we haven't time to do any more, why, we are through.

Q. Are you docked between that time and noon?

A. No, sir.

Q. You are never docked?      A. No, sir.

Q. Now, that Saturday morning—see if I can get the sequence of it—Mr. Slayden came down twice?

A. I don't remember. I don't remember whether he came down twice or not.

Q. Well, he came down and you do remember his saying, "Now, get to work"?

A. Yes, I remember him requesting us to go to work.

Q. And "If you want to join the union, all right, and if you don't, it is all right with me"?



(Testimony of Carrie Monroe.)

A. Yes. I remember that.

Q. (By Trial Examiner Bennett): As I understand it, he told you to get to work, but then he started to speak to you, to you girls?

A. Well, I don't know.

Q. (By Mr. Eberle): Where did he stand? Did he stand in the door when he did this?

A. I don't remember.

Q. Kind of hard to remember, is that it? Now, following that [231] statement, did Ruthe Jensen come down and talk to the girls?

A. Not to my knowledge, she didn't. If she did, I didn't hear her.

Q. When Mr. Slayden talked to you that morning, when Mr. Slayden came down that morning and said about getting back to work, did he say anything about overtime?      A. No.

Q. Or Saturday off?

A. No, not at that time.

Q. Or anything about the Christmas bonus?

A. No.

Q. Loss of existing holidays?      A. No.

Q. (By Trial Examiner Bennett): You said he didn't say something about Saturdays off at that time. Did he say anything about Saturdays off at another time?

A. Well, after, I don't know, no, he never really has talked about Saturdays off. We had Saturdays off once before while I worked down there.

Q. (By Mr. Eberle): I am talking about this Saturday morning. Did he say anything about Sat-

(Testimony of Carrie Monroe.)

urdays off that Saturday morning?      A. No.

Q. All right. Now, did he say anything about loss of existing holidays?

A. He did not. [232]

Q. Or Christmas bonus?      A. No.

Q. Did he say anything about any other privileges or benefits that you might lose if the union was successful in coming into the plant?

A. No.

\* \* \* \* \*

Q. (By Mr. Eberle): Now, did she ever tell you that she had a conversation with Mr. Slayden?

A. I knew she had a conversation with Mr. Slayden.

Q. I say, did she ever tell you?

Mr. Bruckner: May we have the witness complete her answer, please?

Q. (By Trial Examiner Bennett): You said you knew she had a conversation with Mr. Slayden?

A. Yes.

Q. (By Mr. Eberle): Did she ever tell you she had that conversation with Mr. Slayden? [233]

A. I don't remember.

Q. (By Trial Examiner Bennett): How did you know she had this conversation?

A. Well, it was common talk. Everyone was talking about it. Naturally you would know.

Q. (By Mr. Eberle): Was there a lot of talk about the union amongst the girls?

A. Quite a bit, yes.

Q. Later on that morning didn't he come down

(Testimony of Carrie Monroe.)

again and say, "Now, if any of you want to withdraw, you can have the car"?

\* \* \* \* \*

A. I believe he did say he would furnish transportation if we wanted to come over and withdraw.

Q. (By Mr. Eberle): That was later in the morning, though?

Mr. Bruckner: I don't understand this "later in the morning", if the Examiner please. What does that refer to? I don't see any continuity on this.

Mr. Eberle: This is cross examination.

Mr. Bruckner: This is not cross examination, not when you ask questions that bear no relationship to anything——

Mr. Eberle: I am talking about Saturday morning.

Trial Examiner Bennett: She is giving the content of what he said and, as I understand the witness, she is somewhat uncertain [234] about whether it was later in the morning or whether there were one or two visits.

Q. (By Trial Examiner Bennett): You don't know whether he came down once or twice on that Saturday morning?

A. No, I don't remember whether he said it all the same time he was down there or whether he came down twice, I don't know.

Trial Examiner Bennett: To that extent, the reference to "later in the morning" does not reflect the witness' testimony. Let's have another question.

(Testimony of Carrie Monroe.)

Q. (By Mr. Eberle): Was the only car that left that morning to go to the union hall the car of Mrs. Stoddard?

A. The only one that I know of.

Q. And there were five of you in the car?

A. Yes.

Q. You said something about having had Saturdays off in prior years.

A. We had Saturdays off once before, yes.

Q. (By Trial Examiner Bennett): You mean one Saturday?      A. No; several Saturdays.

Q. (By Mr. Eberle): That was in 1952?

A. As far as I remember.

Q. That was year before last?

Q. (By Trial Examiner Bennett): Is that correct?      A. As near as I can remember.

Trial Examiner Bennett: We don't expect you to know everything. We are only interested in how much you do recall.

Q. (By Mr. Eberle): Now, when he came down to speak to you on Saturday morning, Mrs. Monroe, isn't it a fact that Mr. Slayden said to you, "No, it is up to you, whether you want to join the union or not"?      A. That was up to us, yes.

Q. As far as he was concerned, it made no difference whether you joined it or not, whether you joined or didn't join it?

\* \* \* \* \*

Trial Examiner Bennett: You may answer that. Did he say that on that Saturday? [236]

(Testimony of Carrie Monroe.)

A. He said it didn't make any difference whether we joined or not, that was up to us.

Q. (By Mr. Eberle): When did you decide to withdraw after signing up with the union?

A. I thought as long as all the rest of the girls had decided to withdraw, I thought I might as well, too. That is the way I thought about it. As far as joining the union, it didn't matter to me one way or the other.

Q. (By Trial Examiner Bennett): The question was, when did you decide to withdraw?

A. Well, right after I signed it. I wished I hadn't signed it then.

Q. (By Mr. Eberle): Your decision to withdraw, Mrs. Monroe, was that due to any threat or promise by Mr. Slayden or anyone on behalf of the company?           A. No.

\* \* \* \* \*

Q. (By Mr. Eberle): Were you influenced——

A. (Interrupting): No, sir.

Q. (Continuing) ——at all in your decision by anything the company said or did?

Mr. Bruckner: I should like the record to show that the "no" was interposed after the first four words were asked.

Trial Examiner Bennett: The record may so show.

Mr. Eberle: Perhaps I had better ask the question over, [237] if the counsel objects to the answer.

(Testimony of Carrie Monroe.)

Will you read the question again to the witness?

Trial Examiner Bennett: All right. Read it back.

(Last two questions and intervening answer read.)

Mr. Eberle: Have you a "no" at the end of the question, too?

The Reporter: No, sir.

Trial Examiner Bennett: I believe she said "no" both at the end of the question and in the middle. The record may so indicate.

Q. (By Mr. Eberle): When you went over to the union hall on Saturday, Mrs. Monroe, were you sort of taking the lead on behalf of all of them to withdraw from the union?      A. No.

Mr. Bruckner: Objection.

Trial Examiner Bennett: Sustained.

Q. (By Mr. Eberle): Were the girls all at that time expressing themselves in wanting to withdraw from the union?

Mr. Bruckner: Objection.

Trial Examiner Bennett: She may answer that.

A. They wanted, they all wanted to withdraw. I don't think there was any leader or anything like that. It was just a general idea that we wanted to go.

Q. (By Trial Examiner Bennett): This was on Saturday morning when you went to the union hall? [238]      A. Yes.

Q. (By Mr. Eberle): And then you were going to report back to the other girls?

(Testimony of Carrie Monroe.)

A. I didn't say I would, no. I just did because I didn't see any reason for them going over there if the office was closed.

Mr. Eberle: That is all.

Redirect Examination

Q. (By Mr. Bruckner): Mrs. Monroe, this is the first time that you made an attempt to withdraw from the union, isn't it?

A. That is the first time I ever made an attempt to join or withdraw, either one.

Q. (By Trial Examiner Bennett): This Saturday morning?

A. I asked one of the girls if my slip had gone over and she said no, and if it hadn't been over I was going to ask her for it back. And it had gone, so there wasn't any use.

Q. When did you ask this girl that?

A. I don't remember the day.

Q. It was before Saturday, however?

A. Yes.

Q. How soon before Saturday or how many days before Saturday, if you can remember?

A. I don't remember.

Q. You don't remember. But, in any case, the first attempt, aside from the one you just told us, to withdraw your card was made Saturday? [239]

A. Well, you mean when I asked her, I was going to ask her for it back?

Q. No. Aside from that.                      A. Oh, yes.

Q. Saturday was the only time?                      A. Yes.

(Testimony of Carrie Monroe.)

Q. Mrs. Monroe, during any of these conversations or talks that Mr. Slayden made, do you recall him saying in words or effect that if things worked out right the employees could get Saturdays off?

A. Please repeat the question.

Trial Examiner Bennett: The reporter will read it back.

(Last question read.)

A. No.

Q. (By Mr. Bruckner): You don't remember him saying that?      A. No, I don't.

Q. Well, you spoke to me, did you not, Mrs. Monroe, one night last week at the hotel, at the Bannock Hotel?      A. Yes. I believe I did.

Q. And at that time, Mrs. Monroe, I asked you, did I not, about the talks that Mr. Slayden made?

A. I believe you did.

Q. Isn't that right, ma'am?      A. Yes.

Q. And isn't it also true, Mrs. Monroe, that at that time you [240] told me, in answer to a question similar to the one I just asked you, that Mr. Slayden said, and I quote, "If things worked out right, the employees could get Saturdays off"?

Mr. Eberle: Just a moment. Is counsel trying to impeach his own witness?

Mr. Bruckner: I am refreshing the witness's recollection.

A. I might have.

Trial Examiner Bennett: If that is an objection, I will overrule it.

What was the answer?



(Testimony of Carrie Monroe.)

The Witness: I might have. I am not positive.

Mr. Eberle: I can't hear.

Trial Examiner Bennett: She said, "I might have. I am not positive."

Q. (By Mr. Bruckner): I will then ask you this, might Mr. Slayden have said that very thing in any of the talks he gave you?

A. He might have. I am not sure.

Q. He might have? A. I am not sure.

Q. In any case, what is your work shift now, Mrs. Monroe? A. From 8 to 4:30.

Q. Do you work on Saturdays? A. No.

Q. How long have you not been working on Saturdays? [241]

A. I don't remember the exact time we didn't.

Q. Yes, ma'am. Would you say, in relationship to this September 26, you know, this Saturday that we are all talking about, was it soon after that that it occurred? A. I believe it was.

Q. And before that time what was your work shift?

A. We worked from 8 until 4, seven hours a day and five hours on Saturday.

Q. (By Trial Examiner Bennett): And after that your hours changed from 8 to 4:30 five days a week?

A. Yes, and a half-hour lunch, and we used to have an hour.

Q. (By Mr. Eberle): You have a half-hour now instead of an hour? A. Yes.

\* \* \* \* \*

CARRIE TOFANELLI

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows: [242]

Direct Examination

Q. (By Mr. Bruckner): What is your name and address, please?

A. Carrie Tofanelli, 635 West Sublet.

Q. That is in Pocatello, Idaho?

A. Yes.

Q. You are an employee of the Idaho Egg Company?      A. Yes.

Q. How long have you been employed there?

A. Since September 1952.

Q. What is your job?

A. Candling eggs.

Q. Where do you work, Mrs. Tofanelli?

A. Pardon?

Q. What part of the building do you work in? The basement?      A. The basement, yes.

Q. You signed an authorization card, did you not?      A. Yes.

Q. For the union?      A. Yes.

Q. I will show you 7-C, a GC Exhibit. Is that the card you signed?      A. Yes.

Q. Mrs. Tofanelli, were you working at the plant on September 26, which is a Saturday, which was a Saturday, 1953?      A. I think so.

Q. Do you remember any day on which Mr. Slayden came down and [243] spoke to the girls in the candling room?      A. Yes.

(Testimony of Carrie Tofanelli.)

Q. Were you working that day? A. Yes.

Q. That was in September, September 26, on a Saturday? A. Yes.

Q. Now, about what time of the day was this, if you can remember?

A. Oh, about 10:30, I think.

Q. And what did he say?

A. Well, he told us to get to work.

Q. Yes? What else do you remember him saying?

A. Well, he told us, "If you want to join a union, O.K.; if you don't, O.K., too."

Q. And what else?

A. That is all I can remember.

Q. Do you remember him saying anything about withdrawing from the union?

A. Yes. He said if we wanted to go withdraw, we could, we can.

Q. Do you recall whether anything was said about furnishing transportation or a car?

A. I can't remember that.

Q. Do you recall whether anything was said about having Saturdays off?

A. No, I can't remember. [244]

Q. Do you recall speaking to me sometime last week at the Hotel Bannock? A. Yes.

Q. Do you recall my asking you just about the same questions I am asking you now?

A. Yes.

Q. And do you recall, when I asked you this question about whether Mr. Slayden had said that

(Testimony of Carrie Tofanelli.)

if you wanted Saturdays off you could have them, you said, "Yes, that is what he said"?

Mr. Eberle: We object to his question as an effort to impeach his own witness.

Mr. Bruckner: I think the question is proper.

Trial Examiner Bennett: I will overrule the objection.

Q. (By Mr. Bruckner): I did say that?

A. Yes.

Q. You did say that?                      A. Yes.

Q. Is that true, ma'am?                      A. Yes.

Q. I mean, Mr. Slayden said, he did say that, "You can have Saturdays off if you want them off"?                      A. Yes.

Q. Did you leave early that Saturday morning? Again, we are just talking about the same Saturday. Did you leave early?

A. Yes. It was about 11 o'clock, I think. I can't remember. [245]

Q. Where did you go? Did you go home?

A. Yes.

Q. Did you get paid for your time off?

A. I don't know.

Q. Was this usual for you to leave that early?

A. No.

Q. Who gave you permission to leave that early, ma'am?                      A. (No response.)

Q. Well, the other girls left early, too, did they not?                      A. Yes.

Q. How did that come about, that the girls left so early?

(Testimony of Carrie Tofanelli.)

A. Well, they was going down to the union to withdraw their cards.

Q. I see. Had Mr. Slayden or any other official of the company given his permission for them to leave early?      A. Yes.

Q. When was this?      A. I can't remember.

Q. (By Trial Examiner Bennett): Who was it? Was it Mr. Slayden or some other company official who gave the permission?

A. I think Mr. Slayden.

Q. (By Mr. Bruckner): When Mr. Slayden said that you could go down to the union and withdraw your authorization card, do you recall if he said that if you wanted to go down to the union and withdraw your authorization cards, you, the girls, could have [246] the time off to do so?

A. Yes.

Q. Is that what he said, now?

A. I think so. I can't remember.

Q. (By Mr. Eberle): What?      A. I think so.

Q. (By Mr. Bruckner): Since you have been working with the company, when you started in September 1952 to work for the company did you work on Saturdays at that time?      A. Yes.

Q. What was your shift? In other words, what hours did you work and what days?

A. Eight to four.

Q. And that was from Monday through Friday?

A. Yes.

Q. And what did you work Saturday?

A. Seven to twelve.

(Testimony of Carrie Tofanelli.)

Q. When did that shift change, if it did?

A. That I can't remember.

Q. Let me ask you this, do you recall whether it changed shortly after the Saturday, September 26, talk of Mr. Slayden's?      A. I believe so.

Q. What is your shift now, ma'am?

A. From 8 to 4:30.

Q. Do you work on Saturdays? [247]

A. No.

Mr. Bruckner: That is all.

### Cross Examination

Q. (By Mr. Eberle): Mrs. Tofanelli, is this the first time you have ever been a witness?

A. Yes.

Q. Well, there is nothing to be nervous about. Just talk up so I can hear you. Now, when did you start to work for the company?

A. September 1952.

Q. September 1952. On this Saturday, I believe you said that Mr. Slayden first came down and told them to get to work and, as far as the union was concerned, they could either join or not join, is that correct?      A. Yes.

Q. Did he come down later on and make this other statement about if you wanted to withdraw from the union you could take the car, you could take the car if you wanted *with* withdraw from the union? Was that later in the morning?

A. I believe so.

Q. (By Trial Examiner Bennett): In other

(Testimony of Carrie Tofanelli.)

words, did he come down once or twice, if you know?      A. I think so.

Q. Which is it?

A. I just can remember him coming down once.

Q. Did he speak to you on one occasion or two occasions?

A. I just remember him coming down once.

Q. You just remember him coming down once?

A. Yes.

\* \* \* \* \*

Q. (By Mr. Eberle): Now, Mrs. Tofanelli, you said that you didn't recall that Mr. Slayden had made any statement about Saturdays when you first testified this morning, and then later you said that you thought you had told Mr. Bruckner the other day when he talked with you that he had. What is your present recollection? When he came down that Saturday morning did he say anything outside of the fact that you should stop visiting and get back to work and, as far as the union was concerned, you could join, or not? Did he say anything besides that that morning? [249]      A. No.

Trial Examiner Bennett: Just a minute. Did the witness say something else? Had you finished your answer?

The Witness: Yes.

Q. (By Mr. Eberle): Were there a lot of rumors down there about what Mr. Slayden might do or might not do?      A. (No response.)

Q. Did you discuss amongst yourselves about this union?      A. Yes.

(Testimony of Carrie Tofanelli.)

Q. And what might happen?      A. Yes.

Q. Well, now, when did you first decide to withdraw, Mrs. Tofanelli?

A. Well, when all the rest did.

Q. When all the rest of them did?

A. Yes.

Q. (By Trial Examiner Bennett): When was that?

A. Well, I don't know when that was. I can't remember.

Q. (By Mr. Eberle): Who asked you to sign the card?      A. I think it was Erma.

Q. Erma Herzinger?      A. Yes.

Q. And that, was that about the time of the meeting, before or after?

A. It was before. [250]

Q. Before the meeting. Now, what did he say—

Q. (By Trial Examiner Bennett—interrupting): Did you attend the meeting?      A. Yes.

Q. (By Mr. Eberle): What did she say about the union when she asked you to sign?

A. Well, she asked me if I wouldn't sign. And I signed.

Q. (By Trial Examiner Bennett): Is that when you signed?      A. Yes.

Q. (By Mr. Eberle): Did she tell you that they had all signed or anything like that?

A. I can't remember.

Q. Did she say anything about initiation fees?

A. I can't remember.



(Testimony of Carrie Tofanelli.)

Q. How long after you signed did you decide you didn't want in the union?

A. I can't remember that, either.

Q. Well, you decided when all the other girls decided to go out, is that it?      A. Yes.

Q. Kind of a mutual decision?      A. Yes.

Q. Well, let me put it this way, was there anything that Mr. Slayden said or did that influenced you at all in that decision?

Mr. Bruckner: Objection. [251]

Trial Examiner Bennett: I will take the answer.

A. No.

\* \* \* \* \*

### Redirect Examination

Q. (By Mr. Bruckner): You say that nothing Mr. Slayden did or the company did——

Mr. Bruckner: And the Examiner understands that by exploring this line I am not waiving my objection?

Trial Examiner Bennett: All right.

Q. (By Mr. Bruckner—continuing): ——you say that nothing the company did or Mr. Slayden did influenced you in making up your mind to withdraw, is that correct? Do you understand my question?      A. No. Repeat it again.

Mr. Bruckner: Read the question.

(Last question read.)

A. Yes.

Q. You knew that Mr. Slayden had spoken to Mrs. Jensen, Mrs. Ruthe Jensen, didn't you?

A. Yes.

(Testimony of Carrie Tofanelli.)

Q. How did you know?

A. I knew she was up there talking to him.

Q. Didn't she come down and tell you and some of the other girls what Mr. Slayden said?

A. I can't remember.

Q. How did you know that she was up there talking to him?      A. I heard——

\* \* \* \* \*

Q. (By Mr. Eberle): The question is this, you said a little while back that you knew Mrs. Jensen was up talking to Mr. Slayden.      A. Yes.

Q. (By Trial Examiner Bennett): The question now is how did you know that? Did somebody tell you or did Mrs. Jensen tell you or did you see it or what?

A. I think I heard it from the other girls.

Mr. Bruckner: Do you recall Mrs. Jensen——

Mr. Eberle: Heard what, rumors?

Trial Examiner Bennett: Read the answer.

(Last question and answer read.)

Q. (By Mr. Bruckner): Don't you recall, Mrs. Tofanelli, that Ruthe Jensen came down from Mr. Slayden's office and told you and, I believe, Mary Sladek, and a couple of other girls—— [253]

Mr. Eberle: We object to that as being improper redirect examination, endeavoring to cross-examine his own witness, leading and every other objection to it.

Trial Examiner Bennett: I will agree that the question is leading, but in view of the difficulties

(Testimony of Carrie Tofanelli.)

counsel is experiencing with the witness, I think it is not improper. I will overrule the objection.

Q. (By Mr. Bruckner—continuing): —about the conversation that she had with Mr. Slayden? Don't you recall that?

A. I can't remember.

Q. (By Trial Examiner Bennett): You don't remember whether she did or did not, is that it?

A. Yes.

\* \* \* \* \*

### FRANCES SLEPICKA

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

#### Direct Examination

Q. (By Mr. Bruckner): Will you state your name and address, [254] please?

A. Frances Slepicka. When Tofanelli was questioned, my name was wrong on one of those.

Q. You are also known as "Frances F. Sladek", S-l-a-d-e-k, is that correct? A. Yes.

Q. Is Slepicka your married name?

A. Yes.

Q. (By Trial Examiner Bennett): Sladek was your maiden name?

A. No. I was married before.

Q. Sladek was your former name and Slepicka is your present name? A. That is right.

Q. (By Mr. Bruckner): Did you give your address? A. 522 North Garfield.

(Testimony of Frances Slepicka.)

Trial Examiner Bennett: Off the record.

(Discussion off the record.)

Trial Examiner Bennett: On the record.

Q. (By Mr. Bruckner): You are an employee of Idaho Egg Producers, are you?      A. Yes.

Q. When did you start working there?

A. September of '52.

Q. I will show you 8-C, GC Exhibit 8-C. Is that your signature (indicating)? [255]

A. That is right. That is right, when I signed that, that is when I signed that, that is what I signed.

\* \* \* \* \*

Q. (By Mr. Bruckner): Do you remember September 26, 1953?      A. I do.

Q. Anyway you were working at the company then, weren't you?      A. Yes.

Q. And you were an egg candler?      A. Yes.

Q. You are an egg candler?      A. Yes.

Q. Is your job in the basement of the company?

A. Yes.

Q. Do you recall Mr. Slayden coming down and speaking to the girls that day?

A. Yes, I do.

Q. Do you recall what time of the day that was?

A. The first time he came down, about 8 o'clock.

Q. He was down twice?      A. Yes.

Q. And this was 8 o'clock in the morning?

A. Oh, about like that. [256]

Q. What time does the workday start, 7?

A. On Saturdays, yes.

(Testimony of Frances Slepicka.)

Q. It did start at 7 o'clock? A. Yes.

Q. What did he say when he got down there at 8 o'clock in the morning?

A. Well, he caught us whispering and he told us to get in our booths and get to work and stay there.

Q. Did he say anything else?

A. Not at that time.

Q. Did he make another visit down there?

A. Yes.

Q. When? A. Well——

Q. About what time of the day was this?

A. Well, I would say about, it was after rest period.

Q. What time is rest period?

A. Quarter till 10.

Q. What time? A. Quarter till 10.

Q. Are you quite sure it was after rest period?

A. Well, around that time somewhere. [257]

\* \* \* \* \*

Q. (By Mr. Bruckner): Mrs. Slepicka, what did he say when he came down the second time? What did he do and what did he say?

A. Well, in between that time that girl was called upstairs to talk to Mr. Slayden.

Q. Which girl? A. Ruthe Jensen.

Q. (By Trial Examiner Bennett): Jensen?

A. Yes.

Q. (By Mr. Bruckner): Did she return?

A. Yes.

Q. Did she say anything when she returned?

(Testimony of Frances Slepicka.)

A. Yes.

Q. What did she say?

A. She told us what was, the conversation they had, with Mr. Slayden up in the office.

Q. Do you recall what she said?

A. Well, not really all of it. I do recall about some machine that he can put in. And I recall about the union, it doesn't make him any difference if they join the union or if they withdraw, but he never was for the union and still isn't for [258] the union.

Q. Yes, ma'am.

A. And she stood there and spoke to all the girls. I heard it. I don't know if the rest of them did or not.

Q. (By Trial Examiner Bennett): Were the girls working when she spoke or did they stop and stand around her?

A. Well, we can't see exactly in each other's booths, but we all turned, I think.

Q. (By Mr. Bruckner): Was she crying at the time?

A. I have seen her cry so many times, I don't—

Q. Do you remember if she was crying then?

A. Well, her eyes were all red.

Q. Can you recall what else she said at that time, Mrs. Slepicka?      A. Well, not exactly.

Q. Can you recall whether anything was said about Bill Hoffman at that time?

A. Well, I can't exactly say.

(Testimony of Frances Slepicka.)

Q. Had you heard anything at all about Bill Hoffman during that week? A. Yes.

Q. Do you recall from whom you heard it?

A. Just the conversation that was going on downstairs amongst the girls.

Q. What did you hear? [259]

\* \* \* \* \*

A. Well, she said that Mr. Hoffman was supposed to have said what was going on at that union meeting, just who signed and who was there.

Q. (By Trial Examiner Bennett): You say, she said this?

A. Well, Ruthe Jensen told——

Q. Ruthe Jensen told you that?

A. Yes.

Q. When was that?

A. After she had come down from upstairs.

Q. (By Mr. Bruckner): When Mr. Slayden came down for the second time, after Ruthe Jensen returned, do you recall what he did and said then?

A. Well, he just said, "Those that want to go down and withdraw from the union can and those that don't want to"—it's all right with him—"and when you get done with what you are doing you can be excused for the rest of the day."

Q. What else do you recall him saying at that time, Mrs. Slepicka?

A. About some car being ready too, those that didn't have no [260] transportation to get there, for them.

Q. Do you recall him saying anything else at

(Testimony of Frances Slepicka.)

that time, Mrs. Slepicka?      A. No.

Q. I will ask you if you recall anything being said at that time about giving Saturdays off.

A. Yes. He come to the car, I was waiting for the girl that I was going to ride with to the union meeting, to the building to withdraw our signatures, and he come to the car and said why didn't us girls come to him if we wanted Saturdays off.

Q. What other girls were in the car with you?

A. Thora Panter, Elizabeth Pharris.

Q. Up until that time had you had Saturdays off?      A. As long as I worked there, no.

Q. Did you get Saturdays off after that?

A. Yes.

Q. Are you still getting Saturdays off?

A. Yes.

Q. Do you recall whether anything was said on that day—again, I am still talking about Saturday, September 26—do you recall whether anything was said about paying you up until 12 o'clock noon?      A. No.

Q. Do you know if you did get paid up until 12 o'clock noon?

A. I don't really know. [261]

\* \* \* \* \*

#### Cross Examination

Q. (By Mr. Eberle): Do you mind if I call you "Mrs. Sladek"?

A. It doesn't make any difference.

Q. Just a few questions. Did you sign after the meeting, the union meeting, or before?



(Testimony of Frances Slepicka.)

A. No; before.

Q. Who asked you to sign, Mrs. Sladek?

A. Well, there was a couple of the girls come to the house and they left me the slip and I told them I would think it over and I would bring it back to work in the morning, and I did.

Q. (By Trial Examiner Bennett): You brought it back signed in the morning?

A. Well, I brought the slip and then I signed it before I started to work in the morning.

Q. (By Mr. Eberle): What did they say to you when they asked you to sign?

A. They didn't really have much to say because I had joined the union when I was back where I come from.

Q. Who was it, Donna and Ruthe, that saw you?

A. And—there was three girls—and Mrs. Herzinger.

Q. Mrs. Herzinger and Ruthe Jensen and Donna Christenson?

A. And Donna, yes. [262]

Q. Did they say anything about initiation fees?

A. No.

Q. Did they say that the rest of them had all signed up?

A. No, I don't believe they did.

Q. Well, now, then, when Mr. Slayden came down first on Saturday morning, you were all whispering?

A. Yes, we were.

Q. Out of your booths?

A. Yes.

Q. And he said you were behind in your work?

A. Yes. He said that. And we were.

(Testimony of Frances Slepicka.)

Q. And you were?            A. Yes.

Q. (By Trial Examiner Bennett): Was there a lot of work there that Saturday morning?

A. Well, I don't know if there was extra work or not, but there was Saturday's work to be done.

Q. (By Mr. Eberle): And he said get back to work and, as far as the union was concerned, it was up to you to make up your own minds what you wanted to do.            A. Yes.

Q. You could join or not, as you wanted to?

A. Yes.

Q. Now, that was all he said at that time?

A. Well, I believe he said that the second time when he come down. [263]

Q. Yes, but I mean, he didn't say anything else the first time?            A. No.

\* \* \* \* \*

Q. (By Mr. Eberle): Well, now, then he came down the second time?            A. That is right.

Q. And that was later in the morning, after your rest period?            A. Yes.

Q. In the meantime do you know whether someone had told him that you all wanted to withdraw?

A. Told who?

Q. Told Mr. Slayden?

A. Not that I know of.

Q. He just came down and said if you wanted to withdraw, that the car would be available?

A. (No response.)

Q. Is that correct, Mrs. Sladek?

A. Well, I think so.

(Testimony of Frances Slepicka.)

Q. I beg your pardon?

Trial Examiner Bennett: She said, "I think so."

A. I think so.

Q. (By Mr. Eberle): Did you work there last year, in 1952?

A. I started in September of 1952.

Q. I see. But after September they didn't give Saturdays off? [264]

A. After—

Trial Examiner Bennett: Which September?

Q. (By Mr. Eberle): Did you start in '53 or '52?

A. '52.

Trial Examiner Bennett: She started in September '52.

Q. (By Mr. Eberle): After September '52 you didn't get Saturdays off?

A. No.

Q. You don't know what they did before that, in '52?

A. I do not.

Q. Did Ruthe Jensen tell you that Mr. Slayden had told her that if it was any advantage to the girls to have Saturdays off he would try to arrange it during the slack times, just as he had in 1952?

A. She didn't tell me personally, no.

Q. She didn't tell you that? And about these plans, did she tell you that if, in his conversation Mr. Slayden said that if wages got so high they couldn't afford to hire labor, they might have to use machinery?

A. That isn't the words she put it in.

Q. (By Trial Examiner Bennett): That is not, that isn't the words?

A. No.

Q. (By Mr. Eberle): You say, during the week

(Testimony of Frances Slepicka.)

you heard a lot of conversation, rumors, amongst the employees. Is that where [265] you heard some of these things that you have been mentioning?

A. What, for instance?

Q. Well, about Hoffman having told Mr. Slayden about who had signed?      A. Yes.

Q. When Ruthe came down there you were all in your booths, weren't you?      A. Yes.

Q. And you turned and heard her?

A. They was all down there. They should have all heard her.

Q. But you don't know whether they did or not?

A. I don't.

Q. (By Trial Examiner Bennett): You say they should have all heard her. What do you mean by that?

A. We all have our booths in the same room.

Q. You mean, she was speaking loudly enough for everyone to hear?

A. She came right down there.

Q. Was she speaking loudly enough for everyone to hear?

A. About as loud as she was supposed to talk, I guess.

Q. (By Mr. Eberle): A lot of the girls didn't hear, though?

Mr. Bruckner: Objection.

Trial Examiner Bennett: She may answer if she knows.

Do you know whether some of the girls did not hear her?

(Testimony of Frances Slepicka.)

A. I do not, I do not know. [266]

Q. By Mr. Eberle): Well, you heard them say they didn't hear her, didn't you? A. Yes.

Q. When did you decide to withdraw, Mrs. Sladek? A. About the last one.

Q. About the last one. And——

Q. (By Trial Examiner Bennett—interrupting): And when was that?

A. Just after they said they was all going to go up to withdraw, that he said we could have the rest of the day off.

Q. (By Mr. Eberle): In other words, the girls had all made up their minds to withdraw?

Mr. Bruckner: Objection.

Trial Examiner Bennett: Overruled.

You may answer this, if this is what they said. Do you understand the question? We are interested in what you heard said, not what was going on in the minds of the girls. If you heard them say something to that effect, you may tell us about it.

A. I don't know what I was asked. Would you repeat, please?

Q. (By Mr. Eberle): You say you were the last one. Did the girls all say they were going to withdraw, all of them? A. Yes.

Q. And you were the last one? A. Yes.

Q. And after all the rest of them said they were ready to withdraw?

A. I didn't say yes or no, but whatever they——

Q. Whatever they had decided they were going to do? A. Yes.

(Testimony of Frances Slepicka.)

Q. This conversation at the car, that was after you had already decided to withdraw?

A. Yes. Some of them had already gone in the car.

Q. That is the conversation that you testified to, about Mr. Slayden talking to you there at the car?

A. Yes.

Q. That was after you had all made up your minds to withdraw?

A. (Witness nods head affirmatively.)

Q. (By Trial Examiner Bennett): Is that right?

A. Yes. [268]

\* \* \* \* \*

Mr. Bruckner: GC-9 is a typewritten page consisting of names, section, position and rating of employees. This GC-9 for identification also contains strike-outs and in the stipulation both counsel and I have agreed that the strike-outs are in fact strike-outs and the names of those not stricken out are employees who were working within the appropriate unit at the time that the company received the written request to bargain, namely September 24, 1953, and further that the two names added in ink are also to be considered among the employees within the appropriate unit, with the further provision that Azella Taylor—with the further provision that Velma Armstrong, an employee, may or may not be within the appropriate unit, depending upon testimony that will be adduced during the presentation of Respondent's case.

Would you so agree?

(Testimony of Frances Slepicka.)

Trial Examiner Bennett: Is her name on the exhibit? [269]

Mr. Bruckner: Her name is on the exhibit.

Mr. Eberle: So agreed.

Mr. Bruckner: With that agreement, I offer it.

Trial Examiner Bennett: There are five strikeouts?

Mr. Bruckner: And they are meant to be stricken out.

Trial Examiner Bennett: And there are two added on, who were meant to be added on?

Mr. Bruckner: Yes.

Trial Examiner Bennett: And the one conflict is with respect to Velma Armstrong?

Mr. Eberle: Correct.

Mr. Bruckner: That is right, sir. And we both agreed that any finding with respect to her should be made on the basis of evidence which will be adduced in the presentation of Respondent's case.

Trial Examiner Bennett: I count 27 names.

Mr. Bruckner: I believe that is correct. And that includes Velma Armstrong?

Trial Examiner Bennett: Including all, with the exception of the five stricken.

Mr. Bruckner: Yes.

Trial Examiner Bennett: Is that correct?

Mr. Eberle: That is correct.

Trial Examiner Bennett: Do the parties so stipulate?

Mr. Bruckner: So stipulated. [270]

Mr. Eberle: Yes.

Trial Examiner Bennett: So stipulated. \* \* \* \* \*

## CLARENCE LOTT

a witness called by and on behalf of the Examiner, having been previously sworn, was examined and testified further as follows:

## Direct Examination

Q. (By Trial Examiner Bennett): I want to ask you about those two lost cards. I believe you identified them as Monroe and Cordell.

A. Yes. [271]

Q. I am particularly interested in the card of Cordell, and you might incorporate Monroe's card as well. Would you tell us the circumstances of their loss?

A. Well, I can't tell you what became of them. The cards were given to us in a, at two or three different times in an envelope and given to the girl to be filed and to check off the names that had signed on the list of employees that we had written down. We don't know whether it constituted all the employees, but on a list we checked the names——

Trial Examiner Bennett (interrupting): Perhaps if I interjected with a question——

Q. (By Trial Examiner Bennett): Were the cards of Cordell and Monroe included among those cards?      A. Yes.

Q. You don't know what happened to them after that?      A. No.

Q. They just mysteriously disappeared?

A. That is right.



(Testimony of Clarence Lott.)

Cross Examination

Q. (By Mr. Eberle): Do you know where Nina Cordell is now? A. No. No, I don't.

Q. Have you made any effort to find her?

A. No. [272]

\* \* \* \* \*

ORA LENA PANTER

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. Will you state your name in full?

A. Ora Lena Panter.

Q. Mrs. Panter, are you under subpoena from the General Counsel? A. Yes, sir.

Q. Do you live in Pocatello?

A. Route 2 North, Pocatello.

Q. How long have you lived there?

A. About 11 years, I think.

Q. And you are employed by the Idaho Egg Producers? A. Yes, sir.

Q. And during which period have you been employed? A. What is that?

Q. Well, when did you start working there?

A. The 9th of September '48.

Q. And what do you do? [274]

A. I am a boxmaker and a cartoner.

Q. Now, Mrs. Panter, did you sign an authorization card for the local union involved herein?

A. Yes, sir.

(Testimony of Ora Lena Panter.)

Q. About when did you sign that card?

A. After the union, after it was dismissed.

Q. (By Trial Examiner Bennett): After what was dismissed?      A. The union meeting.

Q. (By Mr. Eberle): You attended the union meeting?      A. Yes, sir.

Q. That was about September 22?

A. Yes, sir.

Q. Of last year?      A. Yes, sir.

Q. After the meeting, on Saturday—that would be about the 26th of September—it would be the 26th—Mrs. Panter, were you working when Mr. Slayden came down to talk to the girls?

A. Yes, I was working.

Q. About when was that, in the morning?

A. Well, it was before rest period, coffee time.

Q. Before rest period. Would you just state to us what he said at that time?

A. Well, he said there was too much whispering and talking and “Why don’t you all get in your booth and go to work?” and “If you want to join a union, that is all right with me.” [275]

Q. Have you stated the whole of what he said at that time?      A. I think so, yes, sir.

Mr. Bruckner: I didn’t hear the answer.

The Reporter: “I think so, yes, sir.”

Q. (By Mr. Eberle): Was there any reference to hours or Saturdays or bonuses or anything else in what he said at that time?

A. Well, it was—does that mean what time?

(Testimony of Ora Lena Panter.)

Q. Well, that is, when he came down Saturday morning and spoke to you.

A. Yes. That was around——

Q. By Trial Examiner Bennett): You were asked if he mentioned these other topics at that time.

A. No. I don't know. I can't remember.

Q. (By Mr. Eberle): What I am getting at, did he say anything beside what you first said, "Get back to work" and "If you want to join the union, it's all right", did he say anything else besides that? A. No, sir.

Q. Now, do you know whether he came down again later? A. No, I don't.

Q. Where were you? A. In the box room.

Q. (By Trial Examiner Bennett): Is that a separate room? A. Yes, sir.

Q. Does anyone else work there? [276]

A. Yes. I had a helper, Lyda Conlin.

Trial Examiner Bennett: Is this someone who should be listed on GC-9?

Mr. Eberle: It is on there listed as "Lydia Conley"?

Trial Examiner Bennett: "Lydia Conley"?

Mr. Eberle: Yes.

Q. (By Mr. Eberle): Was she there during this period of time? A. Yes.

Q. In the box room with you? A. Yes.

Q. State whether or not you heard Ruthe Jensen say anything that morning. A. No, sir.

Q. (By Trial Examiner Bennett): Tell me a

(Testimony of Ora Lena Panter.)

little about this room that you work in. You say, it is a separate room?

A. Yes, sir. It is upstairs.

Q. Where do the other girls work?

A. Downstairs.

Q. That is, in the basement?      A. Yes, sir.

Q. Your room is on the first floor?

A. Yes, sir.

Q. And you and Conley work there?

A. Yes, sir.

Q. Does anyone else work in a separate room?

A. Well, the cartoners——

Q. The cartoners have a separate room?

A. Yes, sir.

Q. Where is that?

A. That is down in the basement.

Q. Most of the girls work together in the basement, is that right?

A. Yes, the candlerers do.

Q. (By Mr. Eberle): Candlerers work in a room separate from yours?      A. Yes, sir.

Q. State whether or not you later changed your mind about joining the union.

\* \* \* \* \*

A. Well, I went to Mr. Slayden the next day and said I was sorry I joined the union and he said I could withdraw if I wanted to.

Q. (By Trial Examiner Bennett): Next day after what?      A. The union meeting.

Q. (By Mr. Eberle): Did he say you could either withdraw or stay in, as you wanted to?

(Testimony of Ora Lena Panter.)

A. Yes, sir.

Q. (By Trial Examiner Bennett): Did you speak to anyone connected with the union about it?

A. No, sir. [278]

Q. (By Mr. Eberle): Were you among the girls that were going to the union to withdraw on a Saturday, the 26th of September?

A. Yes, sir.

Q. But you made up your mind to withdraw the day after you had the meeting with the union?

A. Yes, sir.

Mr. Eberle: You may inquire.

### Cross Examination

Q. (By Mr. Bruckner): Mrs. Panter, on Saturday, September 26, did you hear Slayden say anything about "If you girls want time off to withdraw, you can withdraw; if you need transportation, I will furnish it to you"? A. Yes.

Trial Examiner Bennett: May I have the question and answer read back?

(Last question and answer read.)

Trial Examiner Bennett: Next question.

Q. (By Mr. Bruckner): Do you recall anything, if anything else was said at that time?

A. No, sir.

Q. Let me ask you if you can recall anything being said about having Saturdays off?

A. No, sir.

Q. Were you working Saturdays up until then?

A. Yes. [279]

(Testimony of Ora Lena Panter.)

Q. Did you work Saturdays after that?

A. No, sir.

Q. Who informed you that you no longer had to work Saturdays after that?

A. Well, I happened to come in the candling room and that is what the girls told me.

Q. Did you hear Mr. Slayden say anything about going behind his back to sign up with the union?

A. What is that question, please?

Q. Did you hear Mr. Slayden say anything about going behind his back to sign up with the union?

A. Well, I just heard what the girls said.

Q. But you didn't hear Mr. Slayden say that?

A. No, sir.

Q. Did you hear Ruthe Jensen say that?

A. No, sir.

Q. Which girls did you hear say that?

A. I don't remember.

Q. Did you hear that Mr. Hoffman had told Mr. Slayden who had attended the union meeting?

A. No, sir.

Q. You didn't hear that at all?

A. Just the rumors. I——

Q. You heard such a rumor?

A. Yes, sir. [280]

Q. When was the first time you heard that rumor, ma'am?

A. I don't remember.

Q. Was it before or after you told Mr. Slayden that you wanted to withdraw?

A. Oh, that was after.

(Testimony of Ora Lena Panter.)

Q. When did you tell Mr. Slayden you wanted to withdraw?

A. Right the next day after the union meeting.

Q. Was anybody present when you told him that, anybody else?      A. No, sir.

Q. Where did you speak to him?

A. It was downstairs, I believe, I happened to meet him.

Q. What did he say when you told him about that?

A. He said I could withdraw if I wanted to.

Q. This would be on September 23?

A. Yes.

Mr. Bruckner: Just to make sure, let me see the card.

Q. (By Mr. Bruckner): I will show you GC Exhibit 7-A and ask you if this is yours or——

A. No. That is the other——

Q. You are the other Mrs. Panter, is that correct?      A. Yes, sir.

Q. (Indicating) That is yours, showing you GC 7-G, that is yours, is it not?

A. That is mine.

Mr. Eberle: What is the date on that? [281]

Q. (By Mr. Bruckner): And the date on that is September 22, is that correct, ma'am?

A. I believe so, yes, sir.

Q. And that is the date that you signed, right after the meeting was dismissed?

A. Right after the meeting was dismissed.

(Testimony of Ora Lena Panter.)

Q. And you say it was the very next day that you approached Mr. Slayden and told him that you wanted to withdraw?      A. Yes, sir.

Q. Did he say anything when you said that?

Mr. Eberle: She has answered that three times.

Mr. Bruckner: This is the second time.

Trial Examiner Bennett: I will take the answer.

A. He said if I wanted to withdraw I could.

Q. (By Mr. Bruckner): Did he ask anything about the union at that time?      A. No, sir.

Q. Did he say anything about the union at all?

A. I don't remember.

Q. Did he show any surprise about the fact that you had joined a union?

A. Well, I don't remember.

Q. Did he ask you why you joined?

A. No, sir.

Q. Did you tell him why you joined?

A. No, I didn't. [282]

Q. Did you tell him you had signed a card?

A. No, I didn't.

Q. (By Trial Examiner Bennett): How did you happen to go to Mr. Slayden that day?

A. I just happened to meet him, just happened to run onto him.

Q. This was on the 23rd, the next day?

A. Yes.

Q. And you told him you had signed a card after the meeting the night before?

A. Yes, sir.



(Testimony of Ora Lena Panter.)

Q. Did you tell him you had signed it at the meeting the night before?      A. Yes.

Q. And that you were sorry and you wanted to——      A. Withdraw.

Q. Was this on the morning of the 23rd?

A. Yes; it was nearly noon.

Q. Shortly before noon or shortly after noon?

A. Shortly before noon.

Q. (By Mr. Bruckner): Did you know how Mr. Slayden felt about the union at the time you told him you wanted to withdraw?      A. Yes.

\* \* \* \* \*

Q. (By Mr. Bruckner): Why did you go to Mr. Slayden to tell [283] him this?

A. I was sorry I signed it.

\* \* \* \* \*

Q. (By Mr. Bruckner): Why is it that when you met Mr. Slayden in the hall you felt it necessary to tell him that you were sorry you had signed up with the union?

\* \* \* \* \*

A. Well, I was never for a union, I was just sorry that I signed it.

Q. (By Trial Examiner Bennett): The question actually is, I think, how did you happen to speak to Mr. Slayden, rather than anybody else?

A. Well, I wanted him to know about it.

Q. (By Mr. Bruckner): Why did you want him to know about it?      A. I don't know.

Mr. Eberle: Did you say you don't know? [284]

(Testimony of Ora Lena Panter.)

Trial Examiner Bennett: She said, "I don't know."

Mr. Eberle: That is the answer?

Q. (By Mr. Bruckner): Before that, before the meeting of September 22, had Mr. Slayden ever in any way mention about how he felt about the union?

Mr. Eberle: You mean, to her?

Mr. Bruckner: I am speaking to the witness.

A. No, sir.

Q. (By Mr. Bruckner): In your presence or to you?      A. No, sir.

Q. Did you hear Mr. Slayden say anything about Christmas bonuses at any time during the week of September 20?      A. No, sir.

Q. Did you hear Miss, or Mrs., Jensen say anything about that?      A. No, sir.

Q. Did you hear any talk about the union at all?

A. Yes, but I didn't pay much attention to it.

Q. What did you hear? [285]

\* \* \* \* \*

A. I don't remember.

Q. (By Mr. Bruckner): What do you remember about that? You heard that the union was being discussed, Mrs. Panter, didn't you?

A. I don't remember.

\* \* \* \* \*

Mr. Bruckner: That is all.

### Redirect Examination

Q. (By Mr. Eberle): Just one more question,

(Testimony of Ora Lena Panter.)

Mrs. Panter. Your room is separate and apart from the other rooms where they candle and do the cartoning?      A. Yes, sir.

Q. You were one of the persons in the car, who went over to [286] the union hall?

A. Yes, sir.

Q. And with reference to this conversation that you mentioned with Mr. Slayden in connection with Saturdays, was that made at the time when you were in the car, either before you went or when you came back?

A. I don't quite understand that.

Q. When you testified to a statement about, with reference to, Saturdays, by Mr. Slayden——

A. Yes?

Q. Trying to place the time, state whether that was at the time when you were in the car there near the plant.      A. I don't remember that.

Q. (By Trial Examiner Bennett): What was it he said about Saturday?

A. I don't remember that.

Q. (By Mr. Eberle): You don't remember anything he said about it?      A. No.

Mr. Eberle: That is all.

### Recross Examination

Q. (By Mr. Bruckner): You do remember, however, as I understand it, Mrs. Panter, that Slayden did say something about "If you girls want time off, you can withdraw and I will furnish transportation", you remember that, don't you?

(Testimony of Ora Lena Panter.)

Q. Where were you when he said that?

A. Well, he told me that.

Q. There was nobody else there?

A. No.

Q. When did he tell you that?

A. I don't remember the exact time.

Q. (By Trial Examiner Bennett): Were you at work or otherwise?      A. Yes, at work.

Q. Was this on the day following your signing the card?      A. I don't remember.

Q. The day following signing the card, which was on September 22?

A. I don't remember.

Q. (By Mr. Bruckner): On September 23, as I understand your testimony, you met Mr. Slayden in the hall and at that time you told him you were sorry you had joined the union and wanted to withdraw. Do you remember that?      A. Yes.

Q. Did he at that time say, "I will furnish you transportation if you want to withdraw and give you time off"?      A. No, not at that time.

Q. When did he say it?

A. That Saturday morning.

Q. Was anybody else with you there when he said it?      A. No, sir. [288]

Q. Do you mean, he said it to you alone?

A. I was alone.

Q. (By Trial Examiner Bennett): Was Conley there?      A. Yes.

Q. Was she there when he spoke?

A. Yes.

(Testimony of Ora Lena Panter.)

Q. (By Mr. Bruckner): Were you the only two in the boxing room? A. Yes, sir.

Q. Did he come into the boxing room to say that? A. I don't know.

Q. I see. Did he say anything before he made that statement? Did he make any remarks about the union? A. No, sir.

Q. Didn't he say something about "I can do as much for you as the union can" or words to that effect? A. No, sir.

Q. You mean, he just came in and made this one statement and left? A. Yes, sir.

Q. (By Trial Examiner Bennett): How long did he speak to you?

A. Oh, just a couple of minutes.

Q. (By Mr. Bruckner): Did you tell him you had transportation? A. Yes, sir.

Q. You did answer him, then?

A. Oh, yes. [289]

Q. Well, what did you say to him?

A. I had a way to go.

Q. Ma'am? What did you say?

A. I had a ride.

Q. Whom did you have a ride with?

A. Janet Stoddard.

Q. Did you know she was going down to the union hall? A. Yes.

Q. How did you know?

A. I don't remember.

Q. (By Trial Examiner Bennett): But at the time Mr. Slayden spoke to you on Saturday you

(Testimony of Ora Lena Panter.)

already knew that Janet Stoddard was going to the union hall?      A. (No response.)

Q. If I follow your testimony correctly, that is what you said.      A. I don't remember.

Mr. Bruckner: Is there an answer?

The Reporter: "I don't remember".

Q. (By Mr. Bruckner): Did Mrs. Conley say anything?      A. No, sir.

Q. When did you leave your job? How soon after he left did you go down to the union hall?

A. I don't remember the exact time.

Q. Did he say when you could leave?

A. Well, I don't remember. [290]

Q. What did he say about when you could leave?

A. I don't know.

Q. Well, all I am trying to do, Mrs. Panter, is to find out what happened. In other words, as I understand it, he came into the boxing room and he spoke to you and Mrs. Conley and he offered you free transportation and time off if you wanted to go down to the union and withdraw. Is that correct, ma'am?      A. Yes.

Q. You told him at that time that you had a ride with Janet Stoddard?      A. Yes, sir.

Q. You don't remember how you knew you had a ride with Janet Stoddard, is that correct?

A. Well, I don't remember how that came about.

Q. You knew, though, at that time that Janet Stoddard was going to go down to the union hall in her car to withdraw? Is that correct, ma'am?

A. Yes, sir.

(Testimony of Ora Lena Panter.)

Q. But you don't remember how you found that out?

Mr. Eberle: She has said that four times now.

Trial Examiner Bennett: I think her testimony is quite specific that she doesn't know how she found that out.

Q. (By Mr. Bruckner): How soon after Mr. Slayden left you and Mrs. Conley did you leave your work? What were you doing at the time he spoke to you? [291] A. Making boxes.

Q. (By Trial Examiner Bennett): Did you continue making boxes after he left?

A. Yes, sir.

Q. Did you have a certain amount of work to finish?

A. Oh, just to finish whatever we had——

Q. Did you finish whatever you had to do?

A. Yes, sir, I did.

Q. And you then left? A. Yes, sir.

Q. (By Mr. Bruckner): Ordinarily, Mrs. Panter, when you were working on Saturdays what time did you leave the plant?

A. 12 o'clock.

Q. Were there ever any exceptions to this?

A. No, sir.

Mr. Bruckner: That is all.

#### Further Redirect Examination

Q. (By Mr. Eberle): By "exceptions", may I ask you, Mrs. Panter, were there times when you were working there that you finished before noon?

(Testimony of Ora Lena Panter.)

A. Yes, yes. [292]

\* \* \* \* \*

Q. (By Mr. Eberle): Do you know anything about the girls deciding to withdraw prior to the time you arranged your ride?      A. Yes.

Q. You are familiar with that?

A. I don't know.

Q. Well, did you hear any of the girls talking that morning about withdrawing?

A. Yes, I did.

Q. And was it after that that you arranged with Janet Stoddard for your ride?      A. Yes.

Q. And then your conversation with Mr. Slayden was after that?      A. (No response.)

Q. Well, you told him you already had a ride?

A. Yes.

Q. (By Trial Examiner Bennett): Did I understand you to just testify that you arranged your ride with Janet Stoddard?      A. Yes.

Q. I thought you said before that you didn't know how you happened to go with Janet Stoddard, or you didn't know how you happened to have a ride with Janet Stoddard.

A. Well, I don't know how that——

Q. Could you clarify that for me?

A. I can't remember how that was. [293]

Q. You don't know whether you arranged it or not, is that it?      A. I can't remember.

\* \* \* \* \*



ZINA JENSEN

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Eberle): Mrs. Jensen, do you live in Pocatello?

A. I do. Either Alameda or Pocatello. I don't know. They have changed the district. It's either one. I live at 789 McKinley.

Q. How long have you lived here?

A. Four years.

Q. You are employed by the Idaho Egg Producers? A. Yes, sir.

Q. How long have you been employed?

A. September, or October, 2nd of '50.

Q. Do you remember signing an authorization card for the Local Union 983?

A. I signed it.

Q. About when was that?

A. That was the day after they had their meeting. [294]

Q. That was about the 23rd, then; if they had a meeting on the 22nd, it would be the next day.

Trial Examiner Bennett: This is not one of the cards we have in evidence?

The Witness: No. I withdrew mine within five minutes after I signed it.

Trial Examiner Bennett: I am anticipating. Proceed.

Q. (By Mr. Eberle): When they came to have it signed, who asked you? Mrs. Jensen?

(Testimony of Zina Jensen.)

A. Ruthe asked me once and Erma asked me.

Q. That is Ruthe Jensen and Erma Herzinger?

A. Yes, sir.

Q. What if anything did they say at that time?

\* \* \* \* \* [295]

A. Erma came to me and she said, "Do you want to sign this for the union?" She said, "It is for your protection. Otherwise, if the union goes in, you will be fired. It is just for your own protection." That is the very words she told me, right in her booth.

Q. (By Mr. Eberle): You signed it, then?

A. I signed it, yes.

Q. Then what did you do?

A. I went back within five minutes and told her I wanted it back.

Q. (By Trial Examiner Bennett): Did she give it back to you?      A. Yes.

Q. Did you have any trouble getting it back from her?

A. She said, "Why? Are you turning chicken-shit now?" And I said, "You can suit yourself as as why I want it back. I want nothing to do with it. Why I signed it in the first place, you can think what you want to." [296]

Q. Did she give it back to you?

A. She gave it back to me.

Q. (By Mr. Eberle): Were you down at the plant on Saturday, the 26th of September, when Mr. Slayden came down?      A. I was.

Q. Were you working that morning?

(Testimony of Zina Jensen.)

A. I was.

Q. Do you remember what time—did Mr. Slayden come down once or twice that morning?

A. Once before coffee time and once after coffee time.

Q. Now, before coffee time—coffee time is when?

A. Quarter to 10.

Q. Quarter to 10. Before coffee time he came down. And what did he say?

A. He said, "We have got a lot of whispering and goings on here that I want stopped. We have got work to do. I want you to get in your places and go to work". He says. "It's immaterial to me; if you join the union, O. K., and if you don't join the union, O. K. Nobody is going to lose their jobs or be fired. It is up to you girls, but I want you to get to work."

Q. And were you out whispering around that morning? A. We were.

Q. (By Trial Examiner Bennett): What do you do there? A. I candle eggs.

Q. (By Mr. Eberle): So you went back to your booths? [297]

A. I was standing near my booth, my booth is the first one, right on the line as he comes in the door. I was standing there when he came in.

Q. What were they whispering about?

A. The union, whether, who was going to join, who was withdrawing. I think the whole feeling there that morning, everybody had decided to withdraw.

(Testimony of Zina Jensen.)

Mr. Bruckner: Objection. And I move to strike.

Trial Examiner Bennett: The answer may stand.

Q. (By Mr. Eberle): Did he say anything else the first time he was down excepting what you have just said?      A. Not to my knowledge, no.

Q. Now, then, after that, do you know whether anyone went up after he had been down the first time and told him that you all wanted to withdraw?

Mr. Bruckner: Objection.

Trial Examiner Bennett: Sustained.

Q. (By Mr. Eberle): Or if you don't know, why?

Mr. Bruckner: Objection.

Trial Examiner Bennett: Sustained.

Q. (By Mr. Eberle): Well, the second time after he came down, after coffee time, what did he say then?

A. Well, if you would give me a chance to answer that first question——

Q. Go ahead. [298]

A. Ruthe went up and told him we had all decided to withdraw.

\* \* \* \* \*

Q. (By Trial Examiner Bennett): As I understand it, Ruthe came back and spoke to you girls?

A. She never said to one person that I know of, she came back——

Q. You said that Ruthe came back and told——

A. I didn't say she came back. She went up and talked to Mr. Slayden.

(Testimony of Zina Jensen.)

Q. How do you know she went up and talked to Mr. Slayden?

A. She told me, she went up to tell him what us girls wanted, we wanted Saturdays off and we wanted more money.

Q. When did she tell you this?

A. That day.

Q. Before or after she went up?

A. After she came back.

Q. She came back from seeing Mr. Slayden, is that right?      A. Yes.

Q. Tell us again what she said. [299]

A. She didn't say anything except she went up and told him that we wanted to withdraw and that we wanted, he asked her while she was there what he had done to her and she said, "Nothing. We decided we wanted more wages and Saturdays off."

Q. Anything else?

A. That is as far as I know what she told him.

Q. When was it she told you this?

A. After she came back from talking to him.

Q. Was that after the first time that Mr. Slayden spoke to you?      A. Yes.

Trial Examiner Bennett: That is all I have.

Q. (By Mr. Eberle): Then she told you personally, is that it?

A. Well, if you got anything out of her, you had to go to her personally.

\* \* \* \* \*

Q. (By Trial Examiner Bennett): Did you go to her personally and ask her?

(Testimony of Zina Jensen.)

A. I went to her personally and asked her. That is what she told me.

Q. How did you know?

A. She had been crying when she came back from upstairs and I went over and asked her, "What's the trouble, Ruthe?"

Q. And then she told you about it?

A. Yes. [300]

Q. (By Mr. Eberle): She said she told him you all wanted to withdraw?

A. (Witness nods head affirmatively.)

Mr. Bruckner: Was there an answer to that?

The Reporter: She just nodded.

The Witness: I said, "Yes."

Q. (By Mr. Eberle): What did Mr. Slayden say when he came down the second time?

A. "I understand you girls want to withdraw. If any of you want to go, my car is available. I will furnish the transportation."

Q. Did he say anything else?

A. That is as far as I know that he said anything.

Q. Did he furnish any transportation?

A. No, he didn't.

Q. Whose car was used?

A. Janet Stoddard's.

Q. Did you go?      A. Yes.

Q. (By Trial Examiner Bennett): Did you go?

A. Yes. I was riding with her back and forth to work from home.

Mr. Eberle: That is all.

(Testimony of Zina Jensen.)

Cross Examination

Q. (By Mr. Bruckner): You had already withdrawn your card, hadn't you? A. Yes, I had.

Q. Why did you go with her?

A. Because I had to go home. I was riding with her.

Q. Did you receive permission to leave?

A. We did.

Q. Did you? A. I did.

Q. From whom? A. Mr. Slayden.

Q. When?

A. Oh, when he told us we could go home.

Q. Did he tell you personally that you could go?

A. No, he didn't.

Q. What did he say about your leaving?

A. He repeated the question to the whole group that was there. Anybody that wanted to withdraw could go withdraw, he would furnish the transportation.

Q. (By Trial Examiner Bennett): He didn't speak to you personally?

A. He didn't speak to me personally.

Q. But you went along with the other girls that wanted to withdraw? A. Yes.

Mr. Bruckner: You understand, Mr. Examiner, I am not [302] waiving my objection to this evidence by this questioning.

Trial Examiner Bennett: I understand.

Q. (By Mr. Bruckner): You signed a card authorizing the union to represent you. Was that on September 23? Is that right?

(Testimony of Zina Jensen.)

A. That was after their union meeting, whatever day that was. I don't know.

Q. The union meeting was in the evening of September 22. Now, when did you sign your card?

A. The next day, just before quitting time.

Q. What is it Erma told you at the time that you claim Erma told you?

A. She told me that it was for my protection; if I wanted to have protection, O. K., the union would protect me if I joined the union; otherwise I would be fired.

Q. Did she explain what she meant about "protection"?      A. No, she didn't.

Q. Did she explain under what circumstances you would be fired?      A. No, she didn't.

Q. Did she say anything about that if the union came in and you weren't a member you would be fired? Did she say that?      A. No, she didn't.

Q. Did you understand what she meant by "being fired", under what circumstances you would be fired?

A. I wasn't worrying about how I would be fired.

Q. Then you weren't worried about how you would be fired when [303] you signed the card?

A. No.

Q. And the fact that she said that had nothing to do when you signed the card, with you signing the card?      A. No.

Q. You signed it because you wanted to sign it?

A. I signed it, yes.



(Testimony of Zina Jensen.)

Q. You signed it of your own free will because you wanted to?      A. Sure I did.

Q. And you withdrew?

A. Yes; I withdrew of my own free will, too.

Q. All right. Now, who was present when she said that?      A. She was, her and I.

Q. Was anybody else there?

A. Her and I was present, in her booth.

Q. Was anybody else there?      A. No.

Q. Ruthe Jensen wasn't there?

A. No. They were working there but they weren't in the booth while we were talking.

Q. Are you related to Ruthe Jensen?

A. I am not.

Q. When did Mr. Slayden say——

Mr. Bruckner: Strike that.

Q. (By Mr. Bruckner): Did you hear Mr. Slayden say anything [304] about getting Saturdays off?      A. I did not.

Q. Do you recall whether he might have said anything about getting Saturdays off and you just don't remember it?

A. I didn't hear him say anything about Saturdays off.

Q. Did you get Saturdays off after that?

A. We had Saturdays off before that.

Q. When?      A. In '52.

Q. You didn't have it in '53, though, did you?

A. Not previously to that time, no.

Q. When did you get it in '52?

(Testimony of Zina Jensen.)

A. I don't remember the time we got them off——

\* \* \* \* \*

Q. (By Mr. Bruckner): Did you speak to anybody before you came here to testify?

A. No, I didn't.

Q. Did you speak to Mr. Slayden?

A. No, sir.

Q. Did you speak to the attorneys? [305]

A. No, sir. What do you mean? When did I speak to them?

Q. Ma'am?

A. What do you mean, when did I speak to them?

\* \* \* \* \*

Q. (By Mr. Bruckner): About the occurrences the week of September 22, about what took place the week of September 22.

A. Not to my knowledge, no, I didn't speak to him.

Q. You didn't speak to him about that at all?

A. No.

Q. (By Trial Examiner Bennett): Did he speak to you about it?

A. Including the rest of the girls, he spoke to us all.

Q. (By Mr. Bruckner): When was this?

A. Saturday.

Q. (By Trial Examiner Bennett): This past Saturday?

(Testimony of Zina Jensen.)

Q. (By Mr. Bruckner): Which Saturday was this?

A. The Saturday you have been referring to, the Saturday he came down and told us.

Q. (By Trial Examiner Bennett): Just so there will be no misunderstanding [306] about it, he was asking you whether Mr. Slayden had spoken to you or you had spoken to Mr. Slayden within the last few days or the last week or so about all this matter.

A. Does that mean why he was giving advice to me, why I was against the union or for the union or——

Q. Has he discussed this whole subject matter with you or any part of it? A. No, he hasn't.

Q. (By Mr. Bruckner): Did any of these attorneys discuss this subject matter with you before today or today?

A. You mean, have they interviewed me before?

Q. Yes. A. Yes.

Q. Was Mr. Slayden present at that time?

A. No.

Q. Were any other employees present at that time? A. Janet Stoddard.

Q. Who else? A. No one else.

Q. Were you present when any other employees were interviewed? A. No.

Q. Were you at the company property last night at a meeting?

A. Yes, I was there last night. [307]

\* \* \* \* \*

Q. (By Mr. Bruckner): If you don't under-

(Testimony of Zina Jensen.)

stand any of my questions, Mrs. Jensen, all you have to do is say so. You don't have to answer my questions if you don't understand them.

Now, Mrs. Jensen, my last question was this, as I understand your testimony, you said that you were interviewed regarding the subject matter of this case at one time at least in connection with, together with, Mrs. Stoddard. Is that right?

A. That is right.

Q. I am asking you if last night you weren't interviewed concerning the subject matter of this case together with many [308] other employees.

A. Yes, I was last night, yes.

Q. And there were many other employees there at the same time you were spoken to?

A. There were, yes.

Q. Is that correct?                      A. Yes.

Trial Examiner Bennett: Interviewed by whom, counsel?

Q. (By Mr. Bruckner): Interviewed by whom?

A. I don't know. I have been introduced, but I don't know their names (indicating).

Trial Examiner Bennett: Messrs. Eberle and Weston apparently.

Q. (By Mr. Bruckner): Was Ruthe Jensen in this group of girls?                      A. No, she wasn't.

Q. Was she there?                      A. She was there.

Q. Where was she?

A. In a different room.

\* \* \* \* \*

(Testimony of Zina Jensen.)

Q. (By Mr. Bruckner): After you left was she still there?

A. I don't know if she left with us or whether she stayed. [309]

Q. Now, let's go to this Saturday of September 26. When was the first time that Mr. Slayden came down to talk? What time of the day was this?

A. Before 10 o'clock.

Q. And you were in the candling room at the time? A. At the time.

Q. Right near the door? A. Yes.

Q. And what did he say?

A. He said, "There's a lot of whispering going on here and we have got a lot of work to do. It's immaterial to me, either way you want to vote, for the union or against the union, but I want you to get to work."

Q. (By Trial Examiner Bennett): Was there a lot of work to do that morning?

A. Yes. At the time we had a lot of eggs to do.

Q. (By Mr. Bruckner): Yet you got off early that day, didn't you?

A. Well, we didn't have any more than we usually have on a Saturday or any other day, as far as that goes. We have a certain amount to do every day.

Q. If that is the case, you didn't have any more work that day than any other day? You didn't have too many eggs, is that correct?

A. We had our usual amount. [310]

Q. The usual amount. Did he say anything at

(Testimony of Zina Jensen.)

that time about going behind his back and signing up with the union?

A. There may have been something mentioned about that. I don't recall.

Q. There may have been something mentioned about it?      A. Yes.

Q. What may have been mentioned about that?

A. I don't know.

Q. May there have been other things mentioned, too?      A. I don't know.

Mr. Eberle: By whom?

Mr. Bruckner: We are talking about Mr. Slayden. It is very evident.

Mr. Eberle: I object to the question unless he says who made the statement.

Trial Examiner Bennett: You are being asked if Mr. Slayden may have mentioned other things that you don't now remember. The question has been amended.

A. No.

Q. (By Mr. Bruckner): There is one other thing that he may have mentioned that you don't recall, isn't that correct, this business about something possibly having been said about going behind his back to sign up with the union, that may have been mentioned? \* \* \* \* [311]

Q. (By Trial Examiner Bennett): It is right that that may have been mentioned by Mr. Slayden?

A. Yes.

Q. (By Mr. Bruckner): What else may have been mentioned by Mr. Slayden?

(Testimony of Zina Jensen.)

A. I don't know.

Q. May he have mentioned Saturdays off or having Saturdays off?      A. Not that I know of.

Q. Would you say he did not say it?

A. Not when I heard it.

Q. (By Trial Examiner Bennett): What is your answer?

A. Not where I heard him say it, that we should have Saturdays off. I didn't hear him say anything about Saturdays. [312]

Q. (By Mr. Bruckner): Did he say anything about being able to deal with him instead of dealing with the union?

A. Not at that time, no.

Q. When did he say it?

A. I don't know whether he said it. I didn't hear him say it.

Q. How long did he stay down there during his first visit?      A. About five minutes.

Q. And did the girls go back to their booths?

A. They did.

Q. What happened then?

A. As far as I know, they went to work candling eggs.

Q. It is my understanding that you said that Ruthe Jensen then went up to the office and spoke to Mr. Slayden. Is that correct?

A. That is what she said she did.

Q. Was any discussion held about withdrawing from the union after Slayden left?

A. It was before Slayden came down.

(Testimony of Zina Jensen.)

Q. There was discussion about withdrawing from the union before Slayden came down?

A. Yes.

Q. Are you quite sure of this, now?

A. I am sure of that.

Q. Who was discussing it?

A. The whole group.

Q. Do you recall anybody saying anything about it? [313]

A. I don't recall any person except a certain one.

Q. Can't you recall just one person saying anything about withdrawing?

A. You mean, you want me to tell you who I heard say they wanted to withdraw?

Q. That is exactly right.

A. Well, there is Nina Cordell, Janet Stoddard, Carrie Monroe and myself, of which I had already withdrew.

Q. What did Nina Cordell say?

A. I don't know what she said, but I know she was talking about withdrawing. She didn't want to sign in the first place, she said, and she was ready to go out and withdraw.

Q. What did Janet Stoddard say?

A. Along the same line.

Q. What did she say?

A. I don't know what she said.

Q. You don't know what she said? Who was the other one you named?      A. Carrie Monroe.

Q. What did Carrie Monroe say?



(Testimony of Zina Jensen.)

A. Same thing.

Q. What did she say?

A. She was ready to withdraw, she didn't care what the rest of them did, she was out of it, she was ready to get out of it if she could. [314]

Q. And what happened then?

A. As far as I know, nothing.

Q. What happened when Mr. Slayden came down the second time?

A. He came down and told us that he had heard that we wanted to withdraw and, if so, the ones that wanted to go withdraw could go withdraw, he would furnish the transportation.

Q. (By Trial Examiner Bennett): Go with whom? A. If——

Q. Just go withdraw? A. Yes.

Q. (By Mr. Bruckner): The ones who wanted to go withdraw could go withdraw, he would furnish transportation? A. That is right.

Q. Well, you didn't have to withdraw from anything, did you?

A. No, I didn't go to withdraw. I was in the car because that is the only way I had to ride home.

Q. Did he say anything at that time about how he felt about the union?

A. Not that I know of.

Q. Did he say anything at that time about going behind his back to sign up with the union?

A. No, sir.

Q. Did he say anything at that time about having Saturdays off? A. No, sir. [315]

(Testimony of Zina Jensen.)

Q. Did he say anything at that time about if he had known that the employees wanted Saturdays off he could have arranged it or tried to arrange it?

A. No, sir.

Q. Did he ever say anything about that in your presence?      A. No, sir.

Q. As far as you are concerned, he never said anything about any of these things, is that correct?

A. That is right.

Q. Did he say anything at that time about the employees being able to deal with him without the union?      A. Not that I know of.

Q. Did he say anything at that time about being paid up until noon that Saturday, about your being paid up?      A. Not that I know of.

\* \* \* \* \*

# WILLIAM S. HOFFMAN

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

## Direct Examination

Q. (By Mr. Eberle): Will you state your name for the reporter?

A. William S. Hoffman. [316]

Q. Do you live in Pocatello?

A. Yes, I do.

Q. How long have you lived here?

A. Well, off and on since '41.

Q. '41?

(Testimony of William S. Hoffman.)

A. Yes. I have been in and out, in and out of Pocatello.

Q. Do you work for Idaho Egg Producers?

A. Yes, I do.

Q. What do you do?

A. Well, temporarily I am a truck driver, at the present time.

Q. How long have you worked for them?

A. Well, I worked for them two years ago for a little over three years and I have been with them since about the middle of August this time.

Q. Now, Mr. Hoffman, were you subpoenaed to appear here by the General Counsel?

A. Yes, I was.

Q. Did you sign an authorization card for this Local Union 983?      A. Yes, I did.

Q. When did you sign it?

A. Well, I don't remember the date. It was, I don't know whether it was the day before the meeting or two days before they held the meeting.

Q. It was before the meeting which was held on the 22nd?      A. That is right. [317]

Q. Did you attend the meeting?

A. Yes, I did.

Q. Subsequent to the meeting what did you do about getting out of the union?

A. You mean after the meeting?

Q. Yes.

A. Well, I talked to Mr. Slayden about it.

Q. And what did you tell him?

A. Well, I told him we had had this meeting, a

(Testimony of William S. Hoffman.)

meeting, and that when I saw the way things was going, why, I didn't like the setup.

Mr. Bruckner: When was this? Who was present, please?

Q. (By Trial Examiner Bennett): Will you tell us when it was?

A. Well, it was in between the meeting and when Mr. Slayden was notified. I don't know whether it was on a Wednesday night or Thursday night that I talked to him.

Q. (By Mr. Eberle): The meeting was on a Tuesday night, Mr. Hoffman. Did you talk to him on Wednesday or Thursday, then?

A. Well, I believe it was Wednesday, then, yes.

Q. (By Trial Examiner Bennett): You said something about Mr. Slayden being notified. What do you mean by that?

A. Well, I went and told him that we had had the meeting.

Mr. Bruckner: I can't hear that.

The Witness: I went and told him that we had had the meeting, and I had attended the meeting.

Q. (By Trial Examiner Bennett): You spoke to him twice, then, is that it?

A. No. I went to him after the meeting and told him that we had had the meeting.

Q. Let's get it in chronology. Were you at the meeting of the 22nd, Tuesday night?

A. Yes.

Q. When did you go to him and tell him of the meeting and that you had been there?

(Testimony of William S. Hoffman.)

A. Well, I am sure it was Wednesday night.

Q. The next night?

A. The following night from the meeting.

Q. (By Mr. Eberle): When you say about Mr. Slayden being notified, you have reference to the union writing him about their having the authority to——

A. Well, it was, I was told in the plant that he had received well, I don't know what you call it, notification of, or whatever it was from the union.

Q. From the union?           A. Yes.

Q. (By Trial Examiner Bennett): How did you hear that?

A. I was told about it when I come to work.

Q. By co-workers or somebody else?

A. Co-workers, yes.

Q. (By Mr. Eberle): You started an answer that you told him [319] after you saw the setup—what?

A. Well, I couldn't go along with it, it wasn't, well, I don't know how to explain it, like I said at the meeting, I said I didn't want to bite the hand that fed me.

Q. You wanted out, then, the next day?

A. Well, I considered I would be——

\* \* \* \* \*

Q. (By Mr. Eberle): Continue the conversation. What did you tell him about, now?

A. Well, I just told him that, what they had showed me and told me at the union meeting, that they were going at it and trying to take too much,

(Testimony of William S. Hoffman.)

what I mean is, ask too much, and I asked, they said if the union had the election and the union went in, why, they would draw up a council, or a committee rather, of four, three or four men, three or four women, and draw up a contract, which I voluntary asked them if the management could sit in on it as long as they all had to agree on it any-way.

Q. What did Mr. Slayden say to you then?

A. Well, he didn't say too much about it. He kind of felt bad that the employees had went and joined, went ahead, or seen [320] about joining the union. They hadn't joined it yet; they had put it up for an election, you might say.

Q. But he didn't say anything else?

A. No. No. Not that—well, I can't remember what words was used when I talked to him.

Q. Now, Mr. Hoffman, thereafter what, if anything, did you do about getting out a petition to withdraw?

A. Well, I don't know as I done much of anything about it. As far as, I wasn't on speaking terms with hardly any of the employees at the time afterwards, so I was just going to let things slide.

Q. Did you state that you would get out a petition and be the first signer?      A. Yes.

Q. (By Trial Examiner Bennett): To whom?

A. Well, I talked to some of the employees about it. I talked to one of the employees and I told him that I didn't want to have nothing to do with it.

(Testimony of William S. Hoffman.)

And one of the other ones said he just didn't know what the deal was.

\* \* \* \* \*

Q. (By Trial Examiner Bennett): What did you say about a petition?

A. Well, I don't know. I didn't say anything about it to speak of. What I mean is—— [321]

Q. (By Mr. Eberle): That you would be the first to sign?

\* \* \* \* \*

Q. (By Trial Examiner Bennett): You said, or Mr. Eberle raised it to you and that is why I am interested, what did you say about circulating a petition?

A. I think I mentioned if there was one circulated I would be the first one to sign it.

Q. (By Mr. Eberle): You refer to a petition to withdraw from the union?      A. Yes.

Mr. Eberle: You may inquire.

Q. (By Trial Examiner Bennett): Was the subject of a petition discussed between you and Mr. Slayden.

A. Not that I remember of. No. If it was, I don't recall it. Well, I was upset at the time. What I mean is I, well, I guess everybody was. And some of the things that was said, if they were said, I don't recall.

Q. (By Mr. Eberle): Fix the time. This was a day or two after the union meeting, either Wednesday or Thursday? [322]

(Testimony of William S. Hoffman.)

Q. (By Trial Examiner Bennett): That you spoke with the employees, if you know?

A. Well, it was in that week. I can say that. That is as much as I can say about it. It would be towards the end of the week.

Mr. Eberle: You may inquire.

### Cross Examination

Q. (By Mr. Bruckner): You say that Mr. Slayden felt bad about the boys having joined up or signed cards, or the employees?      A. Well—

Q. What made you think that Mr. Slayden felt badly about that? Did he say anything?

A. Well, he didn't come right out and mention anything. You talk to a person and you can figure things out. What I mean is, there was nothing—

Q. On what basis did you come to that conclusion? What did he say? Did he say how he felt about the union?      A. No.

Q. Did he say he liked the union, that he would like to have the union in there, that it was a good thing?

A. He said he didn't know whether it would better them or whether it wouldn't.

Q. You signed your authorization card on September 21, 1953, isn't that right?

A. Whatever the date is there. I don't remember.

Q. I will show you the date on the card, I will show you the [323] card, GC-7-D. Is this your signature, sir (indicating)?

A. That is, yes, sir.



(Testimony of William S. Hoffman.)

Q. Is that the date on which you signed it?

A. Well, that would be the day before the meeting and the meeting was on Tuesday, it would be on Monday, yes.

Q. That is correct, September 21?

A. Yes.

Q. Did you make any attempt to withdraw your card or did you withdraw that card from the union?

A. No, I didn't.

Q. You did not?           A. I did not.

Q. In spite of your talk with Mr. Slayden and all your other talk about a petition, you made no attempt at all to withdraw your card, is that correct?

A. No, I didn't. I didn't figure it would do any good.

Q. (By Trial Examiner Bennett): You said that you learned in the plant that a letter had been received by the company from the union. Is that correct?           A. That is right.

Q. Was that before or after you spoke to Mr. Slayden?           A. That was after.

Q. You spoke to Mr. Slayden before you learned about the letter coming in?

A. Before I found out that letter had come, yes. [324]

Q. You say you just spoke to him once, that one time, on Wednesday?

A. Well, I talked to Mr. Slayden, well, I have talked to him different times, and it's been, well——

Q. I mean in that week.

(Testimony of William S. Hoffman.)

A. I talked to him the morning of the, well, it must have been the morning, the morning after the letter was given to him. I believe, if I remember, recall, I was out of town the day that letter was delivered. I did talk to Mr. Slayden the next morning.

Q. The parties have agreed that the letter was received on Thursday morning. In relation to that, can you fix the time that you spoke to him? That would be Friday morning?

A. That would be Friday morning, yes.

Trial Examiner Bennett: That is all.

Mr. Bruckner: I have nothing further.

#### Redirect Examination

Q. (By Mr. Eberle): Have you been interviewed by Mr. Bruckner?      A. Yes, I have.

Q. Anybody else from the N. L. R. B.?

A. Well, I gave a signed statement here sometime ago.

Q. To Mr. Hilbun?

A. Well, I don't recall the name, his name.

Q. Have you got a copy of that?

A. No, I haven't. [325]

\* \* \* \* \*

RUSSELL W. GOING

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Eberle): Will you state your name for the reporter.

A. Russell W. Going, 404 East Carter.

Q. Do you live in Pocatello? A. Yes.

Q. And you work for Idaho Egg Producers?

A. Yes.

Q. Mr. Going, how long have you worked for them? A. Since September 8.

Q. September 8, 1953? A. Yes, sir.

Q. Now, Mr. Going, in September of last year were you a member of this Local 983?

A. Yes.

Q. And did someone come around with an authorization card? [326] A. Yes.

Q. Who was it?

A. Well, it was some girls. I wasn't familiar with their names.

Q. Are they girls sitting here by General Counsel? A. Yes.

Q. And what did they say about signing?

A. They wanted me to sign it because, they said, the biggest percentage of the other employees had signed it, either had signed it or said they would sign it.

Q. (By Trial Examiner Bennett): You then signed? A. Yes.

Q. (By Mr. Eberle): What, if anything, did

(Testimony Russell W. Going.)

you say about your already being a member of the union?

A. Well, I had—well, I can't remember who said it, but they said something about being fined if I didn't join the union there.

Q. If you didn't sign this card?                      A. Yes.

\* \* \* \* \*

Q. (By Mr. Eberle): Do you remember the notice being posted [327] about an election?

A. I remember it was there.

Q. Was it taken down?                      A. Yes.

\* \* \* \* \*

Q. (By Mr. Eberle): State whether or not anything was said or done with reference to withdrawing from the union by the men.

\* \* \* \* \*

A. Well, we, as I recall, I don't remember much about, much of what was said about withdrawing, but I know I never thought, at the time I never thought much of it. I didn't particularly want to see the union go in there at the time.

\* \* \* \* \*

Q. (By Trial Examiner Bennett): You were a member of the union all through this period, is that right?

A. Yes. I didn't quite understand it, just fully what the union would do, so I didn't, I was wanting to find out what more the union would do for you.

Trial Examiner Bennett: I don't know if I follow the [328] witness correctly, but I would like to have counsel straighten that out. I am under the impres-

(Testimony Russell W. Going.)

sion that he testified that he belonged to the union before this particular campaign started.

Mr. Eberle: That is what I understood, too. They told him if he didn't sign this card, he might be fined.

Q. (By Mr. Eberle): Is that about the substance of it?

A. Well, that is the understanding I had, that there was a chance of getting fined if I never signed it.

Q. (By Trial Examiner Bennett): Are you a member of the union still?           A. Yes, or no.

Q. When did you leave the union?

A. Well, I never paid any more dues after that.

Q. After when?

A. After this, after that night, after that night of the union meeting.

Q. Was that the meeting around the 22nd of September?           A. Yes.

Q. (By Mr. Eberle): What, if anything, did you do in concert with others relative to withdrawing from the union?

Mr. Bruckner: I have a standing objection to this line.

Trial Examiner Bennett: Yes.

Q. (By Mr. Eberle): I mean the men.

A. Well, I never, I just decided I would let it ride to see what would happen. [329]

Q. (By Trial Examiner Bennett): You decided to let it ride?           A. Yes.

(Testimony Russell W. Going.)

Q. (By Mr. Eberle): And you paid no more dues?      A. That is right.

Q. Was anything said about voting on this union matter?

A. Well, that is the understanding I had, that they were going to vote on it.

Mr. Bruckner: I move to strike. It is not fixed as to time, place or person.

Trial Examiner Bennett: Will you fix that?

Q. (By Mr. Eberle): Who told you that?

A. Well, there was a statement come out there, stating the day that they was going to hold a vote on it.

Q. (By Trial Examiner Bennett): A statement came out from whom?

A. From the union, it was posted.

Q. It was supposed to come out or it did come out?      A. It did come out.

Q. When did this happen?

A. That was my understanding, that they had a day set to vote.

Q. To vote on what?

A. To vote on whether the employees wanted to go union or not.

Q. The employees of Idaho Egg?

A. Yes. [330]

\* \* \* \* \*

### Cross Examination

Q. (By Mr. Bruckner): As I understand your testimony concerning the circumstances of your signing the authorization card, you said, without

(Testimony Russell W. Going.)

being able to identify the people who said it to you, or the persons who said it to you, there was something said about a chance of being fined, is that correct, if you didn't sign?           A. Yes.

Q. Do you know who said that?

A. Well, I think Bill Hoffman said——

Q. Bill Hoffman?

A. Yes. He said it first. And then there was one fellow there to see us about the union at my house and we asked him, but I never did get it straight.

Q. (By Trial Examiner Bennett): Was it Bill Hoffman who asked you to sign the card in the first place or was it somebody else?

A. It was girls.

Q. It was girls who asked you to sign, but it was Bill Hoffman who said you might get fined if you didn't sign, is that right? [331]

A. He said something about there might be a chance of it, but I never did get the straight of it.

Q. (By Mr. Bruckner): Was he the only one who mentioned the fact that there was a chance of being fined?

A. Well, there was a fellow who came with those girls, but I can't remember what was, I remember that it was mentioned but I can't remember what was said about it.

Q. (By Trial Examiner Bennett): You don't remember what he, what they, said about it?

A. I don't recall, I can't recall it.

Q. (By Mr. Bruckner): Does September 26 strike any chord with you? Do you remember that

(Testimony Russell W. Going.)

day? That was a Saturday. That was the day, if you can recall, that some of the girls attempted to withdraw from the union. Do you recall that?

A. I don't remember what was——

Q. O. K. What is your job?

A. I was driving truck then, temporarily.

Q. I see. On Saturdays have you been, were you, around the plant?

A. I was doing odd jobs around there, yes.

Q. Do you remember Mr. Slayden saying anything about giving time off to withdraw from the union?      A. Not to me, never.

Q. Do you remember him saying that to anybody else?

A. I never heard him say that at all. [332]

Q. What was your shift before that time? What was your work shift?

A. What do you mean?

Q. Were you working on Saturdays before September 26?      A. Yes.

Q. Working a six-day week, were you?

A. Yes.

Q. What was the time of your work during the week, from Monday through Friday? When did you report and when did you leave?

A. From 8 until 6.

Q. Eight to six?      A. Yes.

Q. (By Trial Examiner Bennett): How about Saturdays?

A. On Saturdays it was from 8 until 5, with an hour at noon.



(Testimony Russell W. Going.)

Q. (By Mr. Bruckner): I see. Are you still working that same shift?

A. Well, I took off sick on November 12 and when I, last Saturday we got off at 1 o'clock, and that is all I know about it.

Q. (By Trial Examiner Bennett): You say you took sick November 12? A. Yes.

Q. How long were you sick?

A. Oh, I just started back to work a week ago last Wednesday.

Q. I see. Well, before you took sick were your working [333] hours changed? A. No.

Q. You took sick in November, didn't you?

A. Yes.

Q. Were your working hours changed any before that?

A. I don't recall them being changed.

Q. Are they the same now as they were before you took sick?

A. Well, we get off at 1 o'clock on Saturdays instead of 5.

Q. Now?

A. Yes. Last Saturday is the first time it was.

Q. (By Trial Examiner Bennett): Is that the first time you ever got off at 1 o'clock on Saturday?

A. That I can recall.

Q. (By Mr. Bruckner): Do you know if this is your present schedule, getting out at 1 o'clock from now on out? A. I don't know.

Q. Have you inquired of anybody if that is the case? A. I haven't inquired.

(Testimony Russell W. Going.)

Q. (By Trial Examiner Bennett): You hope that it is, however?

A. For my sake, yes. [334]

\* \* \* \* \*

# GENE ELLSWORTH

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

## Direct Examination

Q. (By Mr. Eberle): State your name to the reporter.

A. Gene Ellsworth, 748 Poole Street, Pocatello.

Q. Do you work for the Idaho Egg Producers?

A. Yes, sir.

Q. How long have you worked for them?

A. Two years in January, the 15th.

Q. What do you do?      A. Truck driver.

Q. You are here under subpoena by the General Counsel?      A. I was interviewed, yes, sir.

Q. Haven't you a subpoena?      A. Yes, sir.

Q. You were subpoenaed by the General Counsel?      A. Yes, sir.

Q. And also interviewed by him?

A. Yes, sir.

Q. Mr. Ellsworth, did you sign one of these cards we have been discussing here?

A. Well, I signed a little white slip of paper. However, I didn't know what it said when I signed it. [335]

Q. What were you told about it?

Trial Examiner Bennett: If anything.

(Testimony of Gene Ellsworth.)

Mr. Bruckner: May we have this fixed?

Q. (By Mr. Eberle): Well?

A. It was, I was told that it was for the employees to have a meeting with the union to discuss the benefits, if any, with the union.

Q. Do you know when that was signed?

A. It was signed two days before the union had the meeting.

Q. You didn't date it yourself?

A. No, sir.

Q. (By Trial Examiner Bennett): Who was it that told you this? A. Pardon?

Q. Who was it that told you what it was for?

A. Well, this is the first time I ever knew what it was for.

Q. No. You said somebody told you what that slip was for that you signed.

A. Mr. Bruckner.

Q. (By Mr. Eberle): Mr. Who?

A. Bruckner, Mr. Bruckner (indicating).

Trial Examiner Bennett: Pointing to the General Counsel.

Q. (By Mr. Eberle): He told you what it meant now, but what the Examiner wants to know is who told you at the time that you signed it.

Q. (By Trial Examiner Bennett): Did anybody tell you anything [336] then?

A. No. It was just, that was just the general talk around the plant, that we was going to have a, they wanted to hold a, meeting over there to discuss the benefits of the union.

(Testimony of Gene Ellsworth.)

Q. (By Mr. Eberle): Who brought the slip to you to sign, Mr. Ellsworth?

A. Well, it was being passed around at the plant there, but Mrs. Jensen brought the slips to me at that time.

Q. I see. Did she say anything about this being a meeting?

A. She said, "Would you like to sign a slip so we could have a meeting?"

Q. So you could have a meeting?

A. Yes, sir.

Q. When did you find out that it was more than just calling a meeting?

A. When Mr. Bruckner interviewed me at the Bannock Hotel.

\* \* \* \* \*

Q. (By Mr. Eberle): What did you understand it was when you signed it? [337]

\* \* \* \* \*

A. I understood it was just to have a meeting to discuss the benefits, if any, with the union among the employees.

Q. (By Trial Examiner Bennett): You said that Mrs. Jensen brought it to you?

A. Yes, sir.

Q. Did she leave it with you or what?

A. No, sir. I was loading my truck and I just signed it and she kept it.

Q. She kept it after you signed it?

A. Yes, sir.

\* \* \* \* \*

(Testimony of Gene Ellsworth.)

Q. (By Mr. Eberle): What, if anything, did you do or say about [338] getting out later?

A. Well, the way I understood it, I wasn't in, I never knew I was in, so I didn't think I had to get out until I was subpoenaed.

Q. Then you found out?

A. I found out I was definitely in.

\* \* \* \* \*

Q. (By Mr. Eberle): What, if anything, was said to you about an election?

Mr. Bruckner: Objection.—I will withdraw that.

A. About an election?

Q. (By Mr. Eberle): Was anything said to you about it? A. There was nothing said.

\* \* \* \* \*

### Cross Examination

Q. (By Mr. Bruckner): Gene, did Mr. Slayden ever speak to you about the union? [339]

A. No, sir.

Q. Let me ask you this, did he ever ask you how you felt about it?

A. No, sir. I told him how I felt about it.

Q. Isn't it a fact, Mr. Ellsworth, that when you spoke to me in the hotel room at the Bannock I asked you the same question and you answered me by saying, in words or effect, "Mr. Slayden asked me how I felt about it", and you answered, "I don't know", and he said, "I couldn't see where it would benefit you"? Do you remember that?

A. No, sir. If I said that, you must have misunderstood me.

(Testimony of Gene Ellsworth.)

Q. I misunderstood it?

A. You must have done so, if I said it.

Q. What did you say?

A. I said that when I heard about the union I talked to Mr. Slayden and told him my opinion about it and I asked him if he knew how the rest of them felt about it, which he told me no.

Q. (By Trial Examiner Bennett): When was it you spoke to Mr. Slayden with relation to the date of the meeting?

A. The date of the meeting?

Q. The meeting was Tuesday, September 22. Did you attend that meeting?      A. No, sir.

Q. Well, with relation to the day you signed, which was September 21, I believe. [340]

A. I didn't, I never talked to him then.

Q. When did you speak to him, if you know?

A. Well, it was about the time that they had the, it was after they had the, meeting up on the board.

Q. (By Mr. Eberle): The notice of election?

A. Yes, sir.

Mr. Bruckner: I don't think it is particularly important, but I think the record ought to be clarified on this.

Q. (By Mr. Bruckner): Mr. Ellsworth, isn't it true that when we spoke, I mean, you and I spoke, about the authorization card you signed, in explaining it to you I read it to you exactly as it stands on the card, pointing out to you that you had designated the union, Teamsters 983, as the bargain-

(Testimony of Gene Ellsworth.)

ing agency for the purpose of collective bargaining and so forth and so on? Isn't that what I said to you?

A. I can't remember whether you read it to me or not.

Q. Do you remember my explaining that to you?

A. You explained, the understanding I got, it was an electoral vote, unless I took it wrong.

Q. Do you recall my saying that the procedure involved here was that the employees, or a certain number of employees, had signed these cards, these authorization cards, which in fact authorized the union to represent them, and that they had filed a request to bargain with the company and they had filed a petition with the Board, and I showed you the petition? [341]

A. Yes, sir.

Q. Do you remember that?

A. Yes, sir.

Q. And that thereafter both the company and the union had consented to a date for the election? Do you remember that? They agreed there would be an election?

A. I don't remember that.

Q. That there would be a vote?

A. I don't remember.

Q. Do you remember my saying anything about the vote?

A. No, sir.

Mr. Bruckner: That is all.

Trial Examiner Bennett: Anything further?

### Redirect Examination

Q. (By Mr. Eberle): You told counsel that you

(Testimony of Gene Ellsworth.)

told Mr. Slayden what you thought about the union. What did you say?

Mr. Bruckner: Objection.

Mr. Eberle: Well, it is part of the cross-examination. I have a right to go into it.

Trial Examiner Bennett: He may answer. I am still not sure when he told this to Mr. Slayden, but——

Mr. Eberle: I would like to know.

Q. (By Mr. Eberle): What did you tell him?

A. I told him that since I had been studying up on it a little and understood the union, I couldn't see how it would [342] benefit us down there and that I hoped that the rest of them felt the same way.

Q. (By Trial Examiner Bennett): You told him this, if I recall your previous answer, around the time that the thing was posted on the bulletin board?

A. It was after the time, yes.

Q. After it was posted on the board?

A. Yes.

\* \* \* \* \*

### HORATIO C. TALBOT

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

#### Direct Examination

Q. (By Mr. Weston): Do you live in Pocatello?

A. Yes, sir. [343]



(Testimony of Horatio C. Talbot.)

Q. You are working for the Idaho Egg Producers?      A. Yes, sir.

Q. How long have you been working for them?

A. I think 10 years this June.

Q. What is your position there?

A. Foreman.

Q. (By Trial Examiner Bennett): You are Horatio Talbot?      A. Yes, sir.

Q. (By Mr. Weston): How long have you been foreman?

A. I would say maybe seven years.

Q. Will you just tell us briefly your duties as a foreman, particularize as to who you supervise?

A. Well, mostly the men. I don't have anything to do with the women.

Q. (By Trial Examiner Bennett): How many men do you supervise?

A. It must be about 10 or 12 men, I guess.

Q. (By Mr. Weston): So you have 10 or 12 men working under you?

A. I imagine there is that many.

Q. Do you have anything to do with the egg candlers in the basement?

A. I don't have anything to do with the egg candlers.

Q. You of course heard about this campaign to organize employees into the union?

A. Yes, sir. [344]

Q. When did you first hear about it?

\* \* \* \* \*

(Testimony of Horatio C. Talbot.)

A. About two days before they had their meeting.

Q. (By Mr. Weston): The meeting was on Tuesday, the 22nd of September?      A. Yes.

Q. You are talking about the union meeting?

A. It was on Tuesday, it was on Tuesday that I heard about it.

Q. On Tuesday that you heard about it?

A. And the following week, I imagine, the union meeting was the following week. I heard about it on a Tuesday and I imagine the meeting was the following Tuesday. I don't know what [345] day it was on.

Q. Who first spoke to you about it?

A. Bill Hoffman.

Q. What did he say?

A. Well, he just wanted to know if I would join the union. He said there was, well, he started out, he said, "We are going to have a big blowup at the plant." And I couldn't figure what he was talking about. And then I said, "What do you mean?" And he said, "Well, they are going to have a union down there and", he said, "the lid is going to blow off."

\* \* \* \* \*

Q. (By Mr. Weston): That was sometime before the union meeting?

A. Yes, sir. I think it was just a week.

Q. Did they ever ask you to join?

A. Yes, sir.

Mr. Bruckner: Who?

(Testimony of Horatio C. Talbot.)

The Witness: Bill Hoffman.

Mr. Bruckner: I asked who?

Trial Examiner Bennett: Mr. Bruckner said, "Who?" and the witness said, "Bill Hoffman."

Q. (By Mr. Weston): When did they ask you to join with relation to the union meeting, before or after? A. Before. [346]

Q. After the union meeting did you have a further conversation with Mr. Hoffman?

A. Yes.

Q. What was that conversation?

A. Well, I told him what I thought of him for rattin' on the guys. I told him I thought he was pretty small for being the big push and then turning around and ratting on the rest.

Q. (By Trial Examiner Bennett): What do you mean by "ratting on the rest"?

A. Well, I can't figure it myself. He was the guy that kept pushing it and then he was the first one to go against them and squeal.

Q. (By Mr. Weston): Do you mean, he reported the union meeting to the employer?

A. That is right.

Q. And that is what you mean by "ratting"?

A. That is right.

Q. Was that the day after the union meeting?

A. That is right.

Q. Which day would that be, Wednesday the 22nd?

A. Well, I am not sure of the dates, but it was the day after the union meeting.

(Testimony of Horatio C. Talbot.)

Trial Examiner Bennett: Wednesday would be the 23rd, I believe.

Q. (By Mr. Weston): It would be Wednesday, the 23rd?      A. (No response.)

Q. (By Trial Examiner Bennett): How did you know that he had, as you put it, ratted?

A. Well, that kind of stuff don't stay covered up very long.

Q. From whom did you learn it?

A. Well, I heard it from Slayden.

Q. (By Mr. Weston): Did Mr. Hoffman say anything to you at that time about the men or about himself withdrawing from the union?

A. Well, I kind of bawled him out and he wanted, he said, "Well, I will tell you", he said, "I will get up a petition if you will sign it." And I told him I hadn't signed to get in and I wasn't signing nothing with him.

Q. Did he say anything about whether he would sign the petition or not?

A. Oh, yes. He wanted to sign it first if I would sign it.

Q. To get out?

A. Yes, that is what he was wanted to sign it for, to get out. [348]

\* \* \* \* \*

Q. (By Trial Examiner Bennett): Are you directly under Mr. Slayden?      A. Yes, sir.

Q. (By Mr. Weston): Now, on or about that time, or specifically first, did any of the other men

(Testimony of Horatio C. Talbot.)

employees say anything to you that same day about withdrawing?

\* \* \* \* \*

A. Well, I can't say they did say anything personally. We were all there unloading the truck and it was just talked and they were all talking to get out after that. Nobody wanted to back it up.

Q. (By Mr. Weston): Was the general topic of conversation among all the men employees there the question of getting out of the union?

A. There was about four or five of us at the time.

Q. Could you tell us who was there? [349]

A. Well, there was Russell Going, Bernard Godfrey, myself, Frank McKnapp, and I believe we was unloading Montague's truck at the time.

Q. Did he engage in the conversation, too?

A. No, I don't think he was. He was still in the office getting his papers out.

Q. Was that the time when Mr. Hoffman volunteered to circulate a petition?

A. That is right.

Q. Did any of the others express themselves as to whether they did or didn't want to get out of the union?

\* \* \* \* \*

A. I can't say that they did. I don't really know whether they said anything about it right at the time or not.

Q. (By Mr. Weston): Was a notice posted on

(Testimony of Horatio C. Talbot.)

the premises down there with reference to an election?      A. Yes, sir.

Q. Was that notice taken down or changed?

A. It was taken down. I think it was up about four days.

Trial Examiner Bennett: Does the record indicate the date of this posting?

Mr. Bruckner: As far as I can recall, it does not. [350]

\* \* \* \* \*

Trial Examiner Bennett: As I understand, you are in agreement that the notices left Seattle on or about October 26 and were received by Respondent in the normal course of the mail and were posted almost immediately thereafter.

Mr. Bruckner: So stipulated.

Mr. Eberle: So stipulated.

Trial Examiner Bennett: Al right.

Q. (By Mr. Weston): I believe you testified that this notice was taken down.      A. Yes, sir.

Q. Was there some discussion among the employees at the time it was taken down with reference to that?      A. Yes. [351]

\* \* \* \* \*

Q. (By Mr. Weston): There was some discussion among the employees with reference to taking this notice down, was there not?      A. Yes.

Q. Did you hear that discussion?

A. Yes. I was in it. [352]

\* \* \* \* \*

Q. (By Mr. Weston): Mr. Talbot, will you now

(Testimony of Horatio C. Talbot.)

tell us what anyone said to you on that occasion with reference to taking this notice of election down?

A. Well, I can't exactly tell you what anyone said. We was [353] just talking about it, and I know what I said. I said, "I think it ought to go to a vote." And that seemed to be the agreement of everybody in the gang at the time.

Q. (By Trial Examiner Bennett): The male workers? A. Yes.

Q. (By Mr. Weston): Can you tell us who was there at that time?

A. Well, it was talked so many times, I guess everybody in the plant heard it.

Q. (By Trial Examiner Bennett): Was Bill Hoffman in that group?

A. No, I don't think he was. He was out on the truck at the time.

Q. How about Russell Going?

A. I believe he was there.

Q. Was he among those that wanted it to go to a vote? A. Yes, sir.

Q. How about Gene Ellsworth?

A. I don't think he was there. He was on a truck that day. Godfrey was there, and McKnapp.

Q. Were they among those who wanted it to go to a vote? A. Yes, sir.

Q. (By Mr. Weston): Was Going there?

A. Yes, sir.

(Testimony of Horatio C. Talbot.)

Cross Examination

Q. (By Mr. Bruckner): I am a little confused about the talks you had at first with Bill Hoffman. As I recall your testimony, [354] you said something about speaking to him on one Tuesday and then a week later.      A. Well, the——

Q. Could you straighten that out for me, please?

A. Yes. On a Tuesday I took him to Lava to show him an egg route.

Q. Do you know what date that was?

A. No, I don't.

Q. Was that before or after the union meeting?

A. That was before, that was a week before the union meeting.

Q. That was September 15, around in there?

A. I imagine somewhere around in there.

Q. What did he say at that time?

A. He told me they was going to have a blowup down there.

Q. Did he say that——

A. (Interrupting) That they were going to join the union.

Q. Are you sure, Mr. Talbot, that if this was told you it wasn't told you after the meeting?

A. No, sir.

Q. Not——

A. (Interrupting) It was told me previous to the meeting.

Q. Are you sure it wasn't the same week, then, about a day or so before, or the day before?

A. Well, I will tell you, if the union meeting



(Testimony of Horatio C. Talbot.)

was on Tuesday, it had to be on Tuesday because that is the day we go to [355] Lava.

Q. It might have been the same day?

A. It was one week later.

Q. (By Trial Examiner Bennett): Is it possible that it was the same Tuesday?

A. No. It was one week later.

Q. (By Mr. Bruckner): Did he tell you at that time that there was going to be a meeting the next week? A. No, I don't believe he did.

Q. Well, what was the second time he spoke to you?

A. I don't think there was any second time. We talked about it afterwards. It was talked every day for a week. But I don't think he talked to me personally about it after that, because I told him I didn't want to join.

Q. (By Mr. Eberle): You what?

A. Told him I didn't want to join.

Q. (By Mr. Bruckner): Did he give you an authorization card? A. No.

Q. Did he show you one? A. No.

Q. When is the next time——

Mr. Bruckner: Strike that.

Q. (By Mr. Bruckner): When did this talk about the circulation of a petition come up? How soon after the meeting?

A. (No response.) [356]

Q. The meeting, as you remember, was on Tuesday, September 22. What I am asking you is, with

(Testimony of Horatio C. Talbot.)

relation to that day when did this discussion of the circulation of the petition come up?

A. To quit?

Q. Yes.

A. And you say that was on a Tuesday, to have the——

Q. Yes, sir. The meeting was on a Tuesday evening.

A. Well, it was on a Wednesday morning, then.

Q. Wednesday morning?      A. Yes.

Q. Had Mr. Hoffman told you before that that that he had spoken to Mr. Slayden?      A. No.

Q. Had Mr. Slayden told you that Mr. Hoffman had spoken to him?      A. No.

Q. When did Mr. Slayden tell you that Hoffman spoke to him?      A. That morning.

Q. That same morning?

A. That same morning.

Q. Did he tell you, did Mr. Slayden tell you, that Hoffman had spoken to him the evening before?

A. That Hoffman had spoken to him the evening before?

Q. Yes.      A. No. [357]

Q. Did he tell you when he had spoken to him? In other words, did Mr. Slayden tell you when Hoffman spoke to him? Am I confusing you?

A. He came to him between Tuesday night and Wednesday morning, but what time I couldn't say. It was between Wednesday night and——

Q. (Interrupting) Tuesday night?

(Testimony of Horatio C. Talbot.)

A. Tuesday night and Wednesday morning.

Q. That is what I was trying to get.

A. That is right.

Q. And it was certainly before the discussion of the circulation of a petition?

A. To get out, yes.

Q. Is that right?           A. Yes.

Mr. Bruckner: That is all.

### Redirect Examination

Q. (By Mr. Weston): Did you report back to Mr. Slayden? Did you report back to Mr. Slayden about talking to Mr. Hoffman at all?

A. No, I don't believe I did.

Q. This question of the circulation of a petition, was that mentioned to you by Mr. Hoffman after you had told him what you thought of him?

A. That is right. [358]

Q. And at the same time, I mean the same conversation?           A. Yes.

\* \* \* \* \*

### VELMA ARMSTRONG

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

### Direct Examination

Q. (By Mr. Eberle): Can you state your name, now, to the reporter?           A. Velma Armstrong.

Q. Do you live in Pocatello?

A. Yes, I do.

(Testimony of Velma Armstrong.)

Q. Are you employed by the Idaho Egg Producers?      A. Yes, sir.

Q. How long have you been so employed, Mrs. Armstrong?

A. Well, I worked a year ago for six weeks and then I worked for one week during a busy time and then I started, I think it was June or July, and worked ever since.

Q. What work did you do when you were down there?

A. Well, I candled the first six weeks I worked. And then when I came back and helped out the week I was candling. And then I have been in the office this last time. [359]

Q. Now, you started to work in July of 1953?

A. It was either June or July, I think.

Q. June or July?

A. Along in there, yes.

Q. Of '53?      A. Yes.

Q. And up to the time that, well, from June or July to September 26, about how much time did you spend in the office and how much time in the candling?

A. Oh, golly. Well, I was, I worked until the vacations were over in the office all the time. And then I started candling again parttime, working in the office part of the week and candling part of the week.

Q. (By Trial Examiner Bennett): When did you start that?

A. I just don't remember at all.

(Testimony of Velma Armstrong.)

Q. Well, what month, roughly, can you say that?

A. I imagine it was the last part of August, along in there. I am not sure of that.

Mr. Eberle: Let's see if I can't go at it a little differently.

Q. (By Mr. Eberle): Do you remember the day of September 26, the Saturday when the question arose about withdrawing from the union?

A. Yes, sir.

Q. That was the latter part of September. [360]

A. Oh.

Q. How long had you been working candling prior to that time?

A. I only worked, I think it was only two or three weeks that I candled.

Q. Two or three weeks?

A. And then I just quit and decided to work just parttime in the office.

Q. That was after that? What I am going to get at is prior to Saturday, September 26, how long had you been candling?

A. That was just two or three weeks.

Q. Two or three weeks?

A. That is what it seems like, to the best I can remember.

Q. Yes. And the rest of that time, from June, you were in the office? A. Yes.

Q. And since that you have been in the office?

A. Yes.

Q. So that from last June or July, '53, to the

(Testimony of Velma Armstrong.)

present time you have been in the office except for a couple of weeks?

A. And I was in the office then parttime, yes.

Q. (By Trial Examiner Bennett): When was it that you gave up the part-time candling and went back to the office fulltime?

A. I don't remember really whether that was before or after. I really don't remember.

Q. The September 26 day, is that, with relation to that are [361] you able to tell us?

A. That is what I can't remember. I was trying to think whether it was before or after that, but I don't remember.

Q. When you were candling parttime, what portion of your time did you devote to candling?

A. Well, I worked in the office on Wednesdays, Thursdays and Saturdays and candled on Mondays, Tuesdays and Fridays.

Q. A full day in each?

A. Yes. Only on Saturdays I got through about half a day.

Q. (By Mr. Eberle): But your best recollection is that during this period you spent only about two weeks at candling?

A. I just can't remember for sure, but it wasn't very long.

Q. Well, would you say two or three weeks, then?

A. Well, it seems like that is about what it was.

Q. Did you sign one of these slips for the union?

A. Yes, sir, I did.

(Testimony of Velma Armstrong.)

Q. And who asked you to sign it?

A. Mrs. Herzinger.

Q. Mrs. Herzinger? A. Yes, sir.

Q. What did she say when she asked you to sign it?

A. Well, she just said that the girls had all decided for the union and that they had signed and they would like me to sign because they would like to have the union in.

Q. She said all the girls had? [362]

A. I beg pardon?

Q. She said all the girls had signed it?

A. Well, I understood her to say that they had signed.

Q. Did you attend——

Q. (By Trial Examiner Bennett—interrupting): Is that all she said?

A. Yes, as near as I can remember, that is just about what was said.

Q. (By Mr. Eberle): Did you go to the meeting? A. Yes, sir, I did.

Q. What did you do after that about the union?

A. You mean that very night or——

Q. No. I mean after the meeting, or later.

A. Well, not much of anything that—not much of anything that I can remember.

Q. Do you remember that Saturday when the girls went to withdraw? A. Yes, sir, I do.

Q. Were you with any of the group of girls on that day? A. No, sir.

(Testimony of Velma Armstrong.)

Q. (By Trial Examiner Bennett): Was that the day you were working in the office?

A. Yes, I was working in the office that day.

\* \* \* \* \* [363]

Trial Examiner Bennett: I understand that.

You are being asked what, if anything, you said about getting out of the union to the other girls.

A. Well, it's been so long ago, I don't remember just how it did come around, but I, I just don't believe I said anything that day at all.

Q. (By Mr. Eberle): Not that day. I mean later.

Mr. Bruckner: When?

Trial Examiner Bennett: The question is, later.

Mr. Eberle: She can tell.

Q. (By Mr. Eberle): Just tell us when and what.

Trial Examiner Bennett: If anything.

A. We talked it over a little and, of course, from my point [364] I couldn't see any advantage to it, working in the office and things, and they seemed to think that they didn't want it any more and I said that I didn't either, so——

Q. (By Trial Examiner Bennett): That was after that Saturday?      A. Yes.

Mr. Bruckner: After when?

Q. (By Trial Examiner Bennett): After that Saturday, the 26th, is that right?      A. Yes.

Q. (By Mr. Eberle): About when was it?

A. Well, I don't know, I don't see the girls much, only just during my noon hours, I am down



(Testimony of Velma Armstrong.)

there at noon hours on the days that I work, and of course they are so few that I don't talk to them very much. So I just don't remember just—it was shortly after.

Mr. Eberle: You may inquire.

### Cross Examination

Q. (By Mr. Bruckner): Shortly after when, Mrs. Armstrong? A. After this Saturday.

Q. After September 26? A. Yes.

Q. Now, during that week you were working three days in the office and three days candling, is that correct?

A. That is what I am not sure of. I don't remember whether, just when it was that I quit working, candling. [365]

\* \* \* \* \*

### BERNARD GODFREY

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

### Direct Examination

Q. (By Mr. Eberle): Will you state your name?

A. Bernard Godfrey.

Q. Do you live in Pocatello? [366]

A. Yes.

Q. Are you employed by the Idaho Egg Producers? A. Yes, sir.

Q. How long have you been so employed?

A. This time it will be three years in November.

(Testimony of Bernard Godfrey.)

Q. Mr. Godfrey, did you sign one of these slips for the union?      A. Yes, sir.

Q. Do you remember about when it was signed?

A. I really don't sir. It was, oh, just a matter of a few days, I would say, before the meeting at the union office.

Q. Who inquired of you as to signing it?

A. The ones that gave me the slip was Mrs. Herzinger and Mrs. Christenson.

Q. I can't hear you.

A. Mrs. Christenson and Mrs. Herzinger, and one of the fellows came with them, one of the ladies' husbands.

Q. Who was he?      A. Mr. Herzinger.

Q. Came to your house?      A. Yes.

Q. What did they say?

A. Well, just as to the effect, they gave me to understand, I won't say that they told me, but they led me to understand that most of the employees had signed these slips and they didn't want 60 or 70 or 80 per cent, but they wanted a hundred [367] per cent. I thought well, now, I am not going to be the only one in the bunch that don't sign, hold back, and shortly after that I discovered, after I had signed, that I was among the very first that had signed.

Q. Did you go to the meeting?

A. Yes, sir.

Q. And a few days later did you have any discussions among the men employees with reference to the union?

(Testimony of Bernard Godfrey.)

A. Well, there was talk of it.

\* \* \* \* \*

Q. (By Mr. Eberle): Was there talk around the plant about the union, following the meeting?

A. Oh, yes.

Q. What if anything, was said about Mr. Hoffman? [368]

\* \* \* \* \*

A. Well, it is like Mr. Talbot has said, that we thought it was rather, so to speak, ratty that one of our fellow employees would do that, after promoting the idea, then being the first to squeal on us.

Q. Then what?

A. Well, it was cussed and discussed for——

Q. What, if anything, was said following that as to withdrawing?

\* \* \* \* \*

A. Well, there was talk, just to my knowledge, immediately after that that if they was going to carry on like that, if one of the leaders of our group was going to be against us right from the start, neither for nor against us, then why should we as a whole accept the union? We started talking immediately of doing away with it, especially after the sign on the wall had been written that it had been postponed indefinitely.

Q. (By Mr. Eberle): The election?

A. Yes.

Q. (By Trial Examiner Bennett): This talk took place especially after that sign was removed?

A. More so than it was before, sir.

(Testimony of Bernard Godfrey.)

Q. (By Mr. Eberle): What, if any, connection did that have with any understanding with reference to an election? [369]

Mr. Bruckner: Objection.

Trial Examiner Bennett: Sustained.

Mr. Bruckner: I have a running objection here, sir.

Trial Examiner Bennett: I understand.

Q. (By Mr. Eberle): You say with particular reference to when that notice was torn down. What conversations were had with that particular reference?

A. Well, the fellows as a whole wanted the election to go through for obvious reasons. They either would or would not be controlled by the union then.

Q. Had that been mentioned prior to that time, the election?

Mr. Bruckner: Mr. Examiner, I deem it unnecessary to make specific objections.

Trial Examiner Bennett: I don't see, I don't follow that question particularly.

Q. (By Mr. Eberle): Had there been any discussion prior to the time the notice was taken down, discussion of an election?

Mr. Bruckner: Objection.

A. I think so, yes. [370]

\* \* \* \* \*

### Cross Examination

Mr. Bruckner: Again I reserve my objections in spite of the fact that I explore.

Q. (By Mr. Bruckner): You were present in

(Testimony of Bernard Godfrey.)

the court room when Mr. Talbot testified about the time that the notice was taken down that some of the employees were in a group discussing whether it ought to go to a vote? You remember that, don't you?

A. I remember him saying that, yes.

Q. I see. Were you in that group?

A. I could have been, but I can't recall what was being said. As a matter of fact, the fellow that takes care of the basement, he ordinarily was on vacation. It fell to me, to my lot, to go down and take his place while he was on vacation, so there could not have been a lot of discussion between the men and the women that I was not in on, sir.

Q. Did Mr. Slayden ever say anything in your presence about the union?                   A. No, sir.

Q. You never attempted to withdraw your card, did you?                   A. No, sir. \* \* \* \* \* [371]

### THORA PANTER

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

#### Direct Examination

Q. (By Mr. Eberle): Will you state your name to the reporter, and your address, please?

A. Thora Panter, 349 Franklin.

Q. Are you employed by the Idaho Egg Producers?                   A. Yes.

Q. How long have you been so employed?

(Testimony of Thora Panter.)

A. Well, since October 15, 1951.

Q. In what capacity?      A. Egg candler.

Q. You signed an authorization slip for the union, Local 983?      A. Yes, sir.

Q. About when did you do that, Mrs. Panter?

A. I just don't remember whether it was the day before the meeting or whether it was the previous week. I don't recall it.

Q. By whom were you requested to sign? [372]

A. Well, there was three ladies came to my home and I signed it then.

Q. And do you know who they were?

A. Yes. Erma Herzinger, Ruthe Jensen and Donna Christenson.

Q. What did they say, if anything?

A. Well, they just wanted to know if I was interested in the union and told me that they thought it was to our advantage that we join. And anything that was to my advantage, why, I figured I should be in it.

Q. What, if anything, did they say about how many had signed?

A. Well, I don't believe they mentioned any specific number to me.

Q. Did you go to the meeting?      A. Yes.

Q. Now, that was about Tuesday night, wasn't it, the meeting?      A. Yes.

Q. On Saturday—had there been some discussion about the union during the period between Tuesday and Saturday?

(Testimony of Thora Panter.)

A. Well, it didn't seem like there was too much. No one seemed to know too much about it.

Q. I mean, amongst the girls, they did discuss it?  
A. It was kind of a hush-hush affair.

Q. (By Trial Examiner Bennett): It was kind of a hush-hush affair, you say?  
A. Yes. [373]

Q. (By Mr. Eberle): On Saturday, do you remember Mr. Slayden coming down to the room where some of the girls were?

A. Yes. In the candling room.

Q. Did he come down once or twice on Saturday?

A. He came down twice that one Saturday.

Q. The first time, about when was that?

A. Well, it was in the morning, it was between 8 and 10. I couldn't tell you the time. It was in that, between that time.

Q. Can you just state briefly what he said that time?

A. Well, someone must have went up and told him that all the girls wasn't doing their work, they were out of their booths and whispering around, and so he just came down and he said, "Get back to work, keep your mind on your work", and that—I have even forgotten what he did say. It was exactly the way the other girls repeated it.

Q. If I may refresh your recollection, what, if anything, did he say about the union?

A. Oh, he said if we wanted to join the union, why, go ahead and join the union, but if we got in the union we would have to do the work "the

(Testimony of Thora Panter.)

same as you are doing now, you couldn't loaf on the job even if you got in the union."

Q. Was that the substance of that first talk that he made?

A. That was the substance of that first talk.

Q. How long was he there?

A. Well, long enough to say that much. He wasn't there very [374] much. I am the radio operator, and I turned off the radio to listen to him.

Q. You were standing in the doorway?

A. No. I am the second booth. I am on the—I don't know whether I am on the south side or the north side of the building.

Q. Was he standing near the doorway?

A. On one side anyway.

No, he was standing at the top, the top of the room.

Q. Where you enter it?

A. Well, there is two or three entrances to that one room. There is three entrances to it. And he was to the east entrance, I guess you would call it that.

Q. Yes. All right. Now, after he left did Ruthe Jensen come down and talk to you girls?

A. Well, she never come down and talked to me. I didn't even know she had been anywheres. But I could see that there was some disturbance of some sort, so I went over and asked her, I says, "What's the matter?" and she said, "Well, I guess they have all decided to withdraw from the union" and "Is that all right with you?" and I said, "Sure,



(Testimony of Thora Panter.)

anything that the rest want. I am ready for it." And that was all there was to it.

Q. After she had made that statement did Mr. Slayden come down again later?

A. Yes, he came down later and he says, "After you girls finish what you are doing, if you want to go over and resign"—[375]—or "withdraw your cards"—"why, my car is out there; if you haven't got transportation, we will see that you get it."

Q. Did anybody use his car? A. No.

Q. Did you go to the union hall? A. No.

Q. You waited there and finished your work?

A. Yes. Mrs. Sladek and myself was the last ones, I guess, through. We had a stack of eggs, and when you are on one man's eggs you have got to finish them before you go home regardless if it's time to quit.

Q. Is that the general practice? A. Yes.

Q. In prior years when you finished the eggs, for instance, of some man—and there is not time to start another lot, do you quit then, on Saturday mornings? A. Yes, we do.

Q. And you are not docked for that time?

A. No.

Q. When, if at all, did you decide to withdraw, as you have mentioned?

A. Well, I just decided when the rest decided to withdraw. It seemed to be like it was all in a group, it seemed to me.

Q. (By Trial Examiner Bennett): When was that?

(Testimony of Thora Panter.)

A. It was on a Saturday. We all seemed to all decide practically [376] at the same time.

\* \* \* \* \*

Q. (By Mr. Eberle): Well, was that prior to the time that Mr. Slayden came down the second time?      A. Yes, that was.

Q. Have you worked during the years when, or any year when, the candlers did not work on Saturday morning?      A. Yes, sir.

Q. And state whether or not that was during some of the slack periods, when there weren't too many eggs.

A. That was in the summertime.

Mr. Bruckner: What was the answer?

The Reporter: "That was in the summertime."

Q. (By Mr. Eberle): Did that occur in 19—the year before—'52?      A. Yes, in '52.

Q. (By Trial Examiner Bennett): You say the slack period was in the summertime?

A. It generally is, yes.

Q. (By Mr. Eberle): State whether or not anything that was said [377] by Mr. Slayden or anyone on behalf of the company that influenced you in any way in arriving at your decision.

\* \* \* \* \*

A. No. There was a rumor of talk that noon that what he could do to us if we went union, that was the only thing that—he didn't say it. We just surmised it between ourselves. We just figured boy, we would get in a lot of Dutch.

(Testimony of Thora Panter.)

Q. (By Trial Examiner Bennett): You say the girls were discussing that?

A. Yes. They were just discussing that amongst themselves.

Q. Concerning what he might do, but he didn't say anything?

A. Yes. They said he could do that if we went union.

Q. But he didn't say anything about it?

A. But he didn't say anything about it.

### Cross Examination

Q. (By Mr. Bruckner): What did they say that Mr. Slayden could do if you went union?

A. They said that heck, he could just take the eggs over in this storage house and keep them there and fire the whole crew of us and get a whole new bunch in and have them learn how to do it, and when they got so they knew how to candle eggs, why, then they could go get those eggs out of storage and do it.

Q. What day was this that the girls were talking——

A. Well, I don't know. It was after the union was mentioned, [378] and it was during that time. Now, I don't know what day it was. There was noon hour discussions all the time amongst the women. They were down in a room to themselves.

Q. (By Mr. Bruckner): It was after the union meeting, though, wasn't it?

A. Well, I think it was.

(Testimony of Thora Panter.)

Q. Would you say it was before that Saturday, September 26?      A. No, it wasn't before then.

Q. It wasn't?      A. It was after.

Q. It was after that. Was anything said to you about having Saturdays off?      A. No.

Q. In your presence, did you hear Mr. Slayden say anything about having Saturdays off?

A. Not that I recall. He said that we maybe could work something out like that, he said if the eggs got so that we could have Saturdays off we might have it. But that was out in the car. But he never did say that we could have Saturdays off. He said if we could work something out, why, that might be arranged.

Q. (By Trial Examiner Bennett): Did you say that was out in the car?

A. That was out in the car, yes.

Q. Was this on Saturday, as you were about to leave? [379]

A. We were out there waiting for a ride home.

Q. Tell us again what he said on that occasion.

A. Well, he said we might, could arrange for, if that was what we wanted, if that was what we was after, was Saturdays, why, maybe we could work something out that would be to the good of the women.

Q. (By Mr. Bruckner): This was when you were in the car waiting for Ruthe Jensen?

A. To go home.

Q. Was that Ruthe Jensen's car?

A. Yes. But I walked. My husband was to come

(Testimony of Thora Panter.)

after me and I decided I wasn't going to wait for Mrs. Jensen, she was going to be a little late, and she wasn't going in my direction, so I got out and walked.

Q. (By Trial Examiner Bennett): Who else was in the car?

A. Mrs. Sladek and Mrs. Pharris, Elizabeth Pharris.

Q. Which Pharris?

A. Elizabeth Pharris.

Q. Elizabeth? A. Yes.

Q. (By Mr. Bruckner): Was that Evelyn Pharris? A. Elizabeth.

The Witness: Was you in there, Evelyn?

Trial Examiner Bennett: Don't ask anybody else a question.

The Witness: Elizabeth and Evelyn. [380]

Q. (By Mr. Bruckner): Was this after you had heard that the group with Janet Stoddard and Mary Monroe—— A. What?

Q. You had heard that the group that went with Janet Stoddard had arrived at the union hall and the union hall was closed? A. Yes.

Q. And had you intended to go down to withdraw, too? A. Yes.

Q. You were leaving early to do that, weren't you, together with the other girls?

A. I didn't hear you.

Q. I say, you were leaving early, before noon, before 12 o'clock, to do that? A. Yes.

Q. Isn't that correct? A. Yes.

(Testimony of Thora Panter.)

Q. Isn't it true that Mr. Slayden said that you could leave before noon to do that, you would be paid up until noon?

A. Well, I don't remember of him saying anything about we would be paid. He said we could have that, the rest of the morning off after we finished what eggs we were doing, we had to finish the eggs that we were on.

Q. (By Trial Examiner Bennett): Will you tell us again what he said when he came down the second time?

A. He just told us if we were wanting to withdraw from the [381] union, why, his car was available if we didn't have transportation, and if we wanted to go withdraw, why, O. K., and if we didn't, why, that was all right with him, we could go union if we wanted to, but if we didn't want to, he would let us go over and withdraw on that morning.

The Witness: I guess I didn't get it all said the first time.

Mr. Bruckner: Was there anything there that was material.

Trial Examiner Bennett: I don't—just a moment.

Did you have her aside to me?

The Reporter: Yes.

Trial Examiner Bennett: Read the answer back to counsel, the end of it.

(Last statement of the witness read.)

(Testimony of Thora Panter.)

Q. (By Mr. Bruckner): What is it you didn't get said?

A. Well, that he told us we could join the union if we wanted to, he said that was immaterial to him, but if we wanted to withdraw, why, his car was there and if we didn't have transportation——

Q. Yes, I understand that. Didn't he also say at the time something about going behind his back to the union?

A. Well, I don't know. There was so darned much said at that time that I don't know——

Q. You don't remember everything that was said?

A. I don't remember everything that was said.

Q. Yes, ma'am. And don't you remember him saying something about he would rather that the employees deal with him instead of the union, that maybe things could be worked out?

A. Well, I think that he did say that, but I couldn't say when he said it or at what time. I think that he felt like that he could have worked something out if he would have had the chance.

Q. Yes, ma'am. And didn't he say that in the future he would try to arrange——

Mr. Bruckner: Strike that.

Q. (By Mr. Bruckner): Up until that time you had been working Saturdays, hadn't you?

A. Well, we, I—I didn't hear you right.

Q. Up until that time you had been working Saturdays, had you not?

A. Yes.

(Testimony of Thora Panter.)

Q. And after that you didn't work Saturdays any more, did you?      A. No.

Q. As I understand your testimony, you said it was a general practice to quit, or to leave the plant, on Saturday as soon as you had finished your work. Is that correct?      A. No.

Q. Now, that isn't correct, is it?      A. No.

Q. What is the general practice, Mrs. Panter?

A. The practice was to leave about, we got off from 10 to 5 [383] minutes to 12.

Q. And that was always the practice, regardless of whether you had finished your work or not?

A. Well, the impression I got, we asked the question that if we didn't have time to do another man's work, or another man's eggs, why, then, could we quit, and he said yes.

Q. But your regular hours were from, were up until 12 noon on Saturday and up until 4 o'clock at that time during the week, isn't that correct?

A. It was 4.

Q. And your practice was to work until about 10, or 5, minutes of 4, is that right?

A. No. Our practice is to work from, say, all the way from 3:30 to a quarter to 4. It is according to if we feel like that we was able to finish a case of eggs, why, then we call, we can call, for another case of eggs, but if we didn't we swept our booth and cleaned our booth and went and sat down.

Q. And you waited until what time before you left the plant?      A. About 5 till 4.



(Testimony of Thora Panter.)

Q. But you never left the plant before 5 till 4?

A. No, we didn't.

Q. And on Saturday you never left the plant before about 5 to 12, is that correct?

A. Yes, that is correct.

Q. What time did you leave the plant on this Saturday? [384]

A. Well, I couldn't tell you. I had to finish those eggs. And my husband calls Saturday at 5 to 12. And he come down to get me and I was gone. And he met me up there by the Idaho Department Store. So I had walked that far.

Q. (By Trial Examiner Bennett): What is your best recollection as to the time you got through that day?

A. Well, I imagine about a quarter after 11 because we sat and talked in the car a few minutes and then I decided to walk home because Ruthe wasn't going in my direction and I didn't want to cause her any inconvenience.

Trial Examiner Bennett: Next question.

Q. (By Mr. Bruckner): In any case, though, you would have had time to do some more eggs ordinarily, wouldn't you?

A. Oh, I suppose we would have, yes.

Q. So if you hadn't been released by Mr. Slayden at that time you actually would have kept on candling eggs up until the usual hour, which would have been about 5 or 10 to 12, isn't that correct, ma'am?

A. Well, yes.

Q. Did you hear anything said on that Saturday,

(Testimony of Thora Panter.)

September 26, about a Christmas bonus? By anybody, now.

A. I didn't hear it on a Saturday, but I heard it during the week, the women was discussing that. That was another thing that could be taken away from us, they said, if we would go union, that is the women's story. They tried to tell us that. [385]

Q. Yes, ma'am. This was before Saturday, this was during the week, now, as I understand it?

A. I think it was. I am not sure whether it was before the Saturday or after the Saturday.

Q. Was it before some of the girls attempted to withdraw or after?      A. Before what?

Q. Some of the girls with—attemped to withdraw from the union, or was it after that?

A. I don't know.

Q. Well, who said that, do you remember?

A. Yes. I remember who said it.

Q. Who said it?      A. Carrie Monroe.

Q. Do you remember who else might have said that?

A. No. But it was just a general discussion going on about what could happen.

Q. This might have been said during the week of the meeting, though, as far as your recollection is concerned?

A. Well, it could have happened during that week or the week following that. But after they all decided to withdraw it was forgotten, we forgot it.

Q. In other words, then, after you decided to

(Testimony of Thora Panter.)

withdraw the probability is there was no discussion about it, you just forgot it? Is that correct? [386]

A. Yes, we just practically forgot it. I don't think there was too much discussion going on.

\* \* \* \* \*

Q. (By Mr. Bruckner): Do you recall if anything was said about a machine being put in?

A. No, I don't recall it, but I recall of hearing the rumor of it. Mr. Slayden brought us down, it was a long time before this union deal ever came up, he brought us down a picture of a machine-operated plant and said that was what could be placed in there. But I understood that that building was too small for it.

Q. Did you hear anything being said about a machine during that week? A. No.

Q. (By Trial Examiner Bennett): He is referring to the week——

A. (Interrupting) No——

Q. (By Mr. Bruckner): The week of September 22. A. No. [387]

Trial Examiner Bennett: When he is referring to that week, he is referring to the period between Tuesday night, the night of the meeting, and Saturday, when you left early.

Q. (By Mr. Bruckner): Now, you stated that there was a lot of discussion and talk about what Mr. Slayden could do if the union came in and you stated that, for example, for one thing, he could take eggs, put them in the cold storage plant, discharge the regular employees and get new employees

(Testimony of Thora Panter.)

and train them. Was anything said about anything else he could do?      A. No, I don't remember.

Q. Do you remember who said that, though, that particular story?

A. Yes, I remember, I think all of the girls will remember who said it.

Q. Who did say it?      A. Carrie Monroe.

Q. Carrie Monroe. Do you recall whether Mr. Slayden—

Mr. Bruckner: Strike that.

Q. (By Mr. Bruckner): Before Saturday, September 26, had you made any attempt to withdraw from the union?      A. No.

Q. Had you decided to withdraw from the union before that time?

A. I hadn't decided one way or another. [388]  
\* \* \* \* \*

### CECIL SLAYDEN

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

#### Direct Examination

Q. (By Mr. Eberle): Will you state your name?

A. Cecil Slayden.

Q. Do you live in Pocatello?      A. Yes, sir.

Q. How long have you lived here?

A. Twenty years the first day of March.

Q. What is your position with the Idaho Egg Producers?      A. Branch manager.

Q. I take it, Idaho Egg Producers is a cooperative marketing association?      A. Yes, sir.

(Testimony of Cecil Slayden.)

Q. Organized under the Cooperative Marketing Act of Idaho?      A. Yes, sir.

Q. Now, Mr. Slayden, with reference to Ruthe Jensen, did you [389] ask to see her sometime before, in the week of, during the week of September 21?

A. Well, I was down in the basement and I says to Ruthe, "I would like to have a talk with you one of these times, Ruthe", and she says, "That is fine", and I told her it was a little bit late in the day then and we would talk some other time. And she came up the next morning about 8 o'clock.

Q. Will you just state briefly what the conversation was?

Mr. Bruckner: When was this?

Trial Examiner Bennett: Let's fix the date first, if we can.

The Witness: I think that was on Friday, the 25th.

Q. (By Trial Examiner Bennett): She came up on Friday morning?      A. Yes, sir.

Q. You spoke to her on Thursday and she came up on Friday?      A. Yes, sir.

Q. The next question was, give us the conversation.

A. Well, when Ruthe came into my office I said, "Ruthe, what's happened? Haven't I been good to you?" And she said, "Yes, Mr. Slayden, you have been awful good to us, but" she said, "we just figured we could get a little more money." And I told her that I didn't know that was, if that was

(Testimony of Cecil Slayden.)

possible or not, but I hadn't heard that the girls, of any them, was dissatisfied and that was the first of my knowledge of them being dissatisfied.

Q. (By Mr. Eberle): What did you say about negotiating a contract, if the union came in? [390]

Mr. Bruckner: This is direct examination. This is an important witness and this is direct examination.

Mr. Eberle: I will withdraw the question.

Trial Examiner Bennett: Will you exhaust the witness first.

A. Well, we talked about the wages and so on and so forth.

Q. (By Mr. Eberle): What else was said?

A. And of course we talked about the union and she asked me, "What about our Christmas bonuses and our paid holidays?" and I said, "Well, that would be entirely up to the union, that would be up to the union contract, whatever the contract with the union was, whether we gave paid holidays and Christmas bonuses."

Q. Was anything else said?

A. No, nothing more that I know of.

Q. (By Trial Examiner Bennett): How did she happen to ask about the bonuses and holidays?

A. Well, she was just discussing about the wages and so on and so forth and she, well, I don't know, other than, other than we were talking about the union and she, she says, "Will the union take that away from us?"

(Testimony of Cecil Slayden.)

Q. (By Mr. Eberle): What, if anything, was said about Saturdays?

A. Well, there wasn't anything, I don't think, said at that time about—well, yes, there was, too. I will admit that. She said, I asked her what they wanted and she says well, they would like to have Saturday off, and I says well, it had been [391] customary in the past for us to let them have Saturday off during a time when we weren't rushed and that if it could be worked out that we could have Saturdays off.

Q. Was anything said about a machine?

A. Yes. At that time we were talking and she, I told them that this machine, it all depended on what the demands were for wages and if the expense got too prohibitive that there was machinery that we could put in to candle eggs.

Q. (By Trial Examiner Bennett): This is what you told Jensen?

A. That is what I told Jensen, yes, sir.

Q. (By Mr. Eberle): You had discussed that with her in prior years?                      A. Oh, yes.

Mr. Bruckner: Objection.— All right, I will withdraw it.

Q. (By Mr. Eberle): I mean, she was familiar with that situation?

A. Well, they were all familiar with it.

\* \* \* \* \*

Q. (By Mr. Eberle): Before you talked to her had you gone down and talked to the employees that morning?                      A. No, sir, not that day.

(Testimony of Cecil Slayden.)

Q. Not that day?                      A. No, sir. [392]

Q. That wasn't on Saturday?                      A. No, sir.

Q. All right. Now, on Saturday morning, then, did you go down and talk to the employees?

A. Yes. The word came to my office that they weren't getting their work done and this person wanted to know if I could come down and see if I couldn't get those girls quietened down, and I did, and I went down and I told them that their candling sheets were balled up and that their grades were off and that they weren't getting any volume and I wanted them to get in the booths and do their work and forget about the union at that time and make up their mind, if they wanted to vote and go union, that was strictly up to them, and if they didn't, why, that was their privilege.

Q. (By Trial Examiner Bennett): Do you know what time this was?

A. Well, I would say that was around between 8:30 and 9 o'clock.

Q. How long did your remarks last?

A. Not more than a couple of minutes at the most.

Q. (By Mr. Eberle): You have given us the entire statement then, at that time?

A. Yes, sir.

Q. Now, subsequent to that what, if anything, did Ruthe Jensen come and say to you?

A. Well, after that, after I had talked to the girls that morning, I went back upstairs. Ruthe Jensen came to me and [393] says, "We have all



(Testimony of Cecil Slayden.)

decided to withdraw," and I said, "Well, that is fine, that is your privilege, and any of those girls that wants to withdraw, that is up to them. And if they haven't got transportation I have got a car here that can furnish transportation."

Q. Following that, what did you do, if anything, with reference to going down and telling the girls?

A. Following that, I went down and told the girls, later on, and talked to them and said that I had heard that they all wanted to withdraw, and if that was what they wanted to do, that was their privilege, but I wasn't telling them whether they could join the union or whether they couldn't.

\* \* \* \* \*

Q. (By Mr. Eberle): With reference to the car, will you state what, if any, practice you had prior to that time with reference to the use of the car in connection with the employees.

A. Well, my car has always been free to employees in case, well, there has been times that we went uptown and got them ice cream cones and there has been times that we went up and got doughnuts for the coffee and there has been other times that I [394] have taken them home when they were sick and other times that I have taken them to the doctor.

Q. Will you tell us also any instances where you had changed the Saturday hours in prior years?

A. Yes. A year ago the girls came to me and wanted to know if they couldn't have Saturday off. And I told them yes. At that time the volume was

(Testimony of Cecil Slayden.)

down, our egg sales were low and it wasn't compulsory that we work on Saturdays, so we let them have Saturdays off. And then later on, when we needed them, why, we put them back on and worked Saturdays again.

Q. (By Trial Examiner Bennett): How long a period did that cover?

A. I think that amounted from about six to eight weeks.

Q. From when to when, approximately?

A. I think that was July through August, about.

Q. Would that be July through August of 1952?

A. Yes, sir. [395]

\* \* \* \* \*

Q. (By Mr. Eberle): Was there any custom or practice with reference to paying a girl until 12 o'clock on Saturday, where a girl had completed her work and there was not sufficient time to complete a new batch?      A. Yes.

Q. State what that was.

A. Well, as previously, it has been told that there has been certain lots to be done. Sometimes these lots comes in in five, ten and to 20 cases, and in other cases, three and four-case lots, and if a girl finishes up a case of eggs at 12:30 and there isn't a small lot, or at 11:30, and there isn't a small lot for her to start on, she is automatically through for that day and she gets paid right up to her full time.

Q. (By Trial Examiner Bennett): What if she gets through at 11?

(Testimony of Cecil Slayden.)

A. Well, it isn't often that they get through at 11. We try to arrange it to where they don't get through at 11.

Q. (By Mr. Eberle): With reference to Velma Armstrong, I think she testified she started to work again in June or July. Can you tell us, between then and the end of last year, about how [396] many weeks she was in the office and how many weeks she worked at candling?

A. You mean, up until the present, from the time she started until this——

Q. Yes.

A. Well, I think she had been in the office about three weeks, somewhere around close to that, three to four weeks, parttime, and she worked on Wednesdays, Thursdays and Saturdays in the office. And the rest of the time she candled eggs.

Q. How many weeks did she candle eggs before she went back to the office again?

A. I don't know for sure. I don't know for sure just how long she did candle eggs.

Q. (By Trial Examiner Bennett): Do you know when she candled?

A. Yes. I know she was candling in the month of August.

Q. Of 1953?

A. Of 1953. And she was also working in the office.

Q. (By Mr. Eberle): All right. Now, let me put it this way. She is now working three days a week in the office? A. Yes, sir.

(Testimony of Cecil Slayden.)

Q. But she is not candling?      A. No, sir.

Q. How long has that been?

A. Well, she started that about a week after the 22nd, the 26th or somewhere along in there, voluntarily. [297]

Q. Since the 26th of September 1953 she has done no candling?      A. No, sir.

Q. And prior to August 1953 she didn't do candling?

A. Prior to August? I couldn't say, Mr. Eberle, just what time she came to work there.

Q. (By Trial Examiner Bennett): Let me see if I have this straight. You said she candled part-time in August and also parttime in September. Is that right?

A. Yes. But, if I understand, the question was how long she came before that, and I don't know that.

Q. I am more interested in what happened afterwards at the moment.      A. Yes?

Q. How late in September did you say she candled?

A. Well, I would say she candled right up until about the 1st of October.

Q. And then she went on to fulltime or parttime office work?

A. She went on to parttime office work, voluntarily.

Q. And she was just working several days a week?      A. Three days a week.

Q. And she still remains in that status?

(Testimony of Cecil Slayden.)

A. Yes, she is still working that.

Q. According to your testimony, she worked as a parttime candler for at least during two months, during August and September.

A. Well, I would say six weeks to two months.

Q. (By Mr. Eberle): And prior to that time she was doing office work?

A. No, sir. She wasn't doing office work prior to the time that she started candling eggs for us.

Q. I thought she started to work in June.

A. She started to work in June and she worked a little while and then we run out of work for a little while and we laid her off and then we got her to come back and work in the office and work part-time in the candling room.

Q. And that was during August and September?

A. Yes.

Q. (By Trial Examiner Bennett): So, to sum it up, as well as you recall, from sometime in August until approximately October 1 she worked this parttime candling detail? A. Yes.

Q. Her time was divided up about fifty-fifty?

A. Yes, sir.

Q. (By Mr. Eberle): State whether or not you ever told Mr. Lott or Mr. Doss that they could not talk to the employees off the premises.

A. I never did tell them that they couldn't talk to the employees off from the premises.

Q. What, if anything, did you say about your desire to be present if they talked to them on the premises?

(Testimony of Cecil Slayden.)

A. Well, they said they was going to come there and have the [399] meeting and I told them I would be there.

Q. State whether or not you ever called them a Communist.      A. No, sir, I did not.

Q. Was there some conversation about that?

A. No, sir.

Q. What was that?

A. There wasn't any. Mr. Lott asked me if I had called them Communist and I told them no.

Q. Did you ever make any statements to them, or admissions, of what you had said to Ruthe Jensen other than your testimony of what you said to her today?      A. No, sir.

\* \* \* \* \*

Q. (By Mr. Eberle): Did they come to the premises and have a meeting with the employees when you were not there?      A. Yes, sir.

Q. Did they inquire for you before they had the meeting?      A. No, sir. [400]

\* \* \* \* \*

Q. (By Mr. Eberle): Mr. Slayden, there is in the charge that you accused employees of instigating the union. Will you state whether you have ever made any statement with reference thereto to any employee?      A. No, sir.

\* \* \* \* \*

Q. (By Mr. Eberle): Mr. Slayden, it is also in the charge, in the complaint, that on or about September 24, 25 and 26, 1953, you threatened employees individually and collectively with loss of

(Testimony of Cecil Slayden.)

existing holidays, Christmas bonuses and other privileges and benefits in the event the union was successful in coming into the plant. Will you state what, if any, statement you made to any employee with reference thereto?

A. I didn't make any statement to any employees with that reference. The question came to me about the Christmas bonuses and the holidays, paid holidays.

Q. It is also charged that on or about September 24, 25 and 26, 1953, you promised Saturdays off, shorter hours and more overtime.

A. Well, I did in this respect, that we had had Saturdays off [401] the time before. And I didn't promise no overtime, no more overtime.

\* \* \* \* \*

### Cross Examination

Q. (By Mr. Bruckner): Mr. Slayden, about Velma Armstrong, isn't it true that the company considered her to have a classification of an egg candler? A. Well, that is probably right, yes.

Q. I am referring specifically to the month of September 1953 and the month of August 1953.

A. Yes, sir.

Q. Am I correct, sir?

A. Yes, she was classified as an egg candler.

Q. When is your slack season?

A. Well, our slack season usually starts along about in the, from August to, on through until October, November and clear through into June. Our storage eggs——

(Testimony of Cecil Slayden.)

Q. (By Trial Examiner Bennett—interrupting): Just a minute. Do you mean July and August are your only busy months?

A. That is our busiest months.

Q. Well, according to your prior answer, you had a 10-month [402] slack season.

A. Well, we, in July and August, are candling storage eggs and fresh eggs are coming in from the producers' pullets at the same time, and that is quite a problem. Now, we hire girls here for maybe three or four months a year and then we have to lay them off. And there is no more work until the following season, along about July, August and September.

Q. Is there such a thing as a slack season for your regular crew?

A. No, sir. We don't have a slack season for regular crew because the regular crew that works, we try to arrange to keep forty hours, we lay off according to seniority and try to give those girls 40 hours a week work, working time.

Q. So actually the work is pretty steady with the exception of a couple of months when the storage eggs and the pullets happen to coincide?

A. That is right.

Q. (By Mr. Bruckner): As a matter of fact, Mr. Slayden, isn't it true that you commenced to give Saturdays off on October 3, 1953?

A. Yes, sir.

Q. Isn't it true that you did that in response to



(Testimony of Cecil Slayden.)

a request from the employees to have Saturdays off?      A. Not necessarily.

Q. Did you or did you not? [403]

A. I did and it because our volume was down and we had done that previously.

Q. You did this voluntarily?      A. Yes, sir.

Q. You did this without any request from employees——

A. (Interrupting) I was asked for it——

Q. (Interrupting) Let me finish my question, please.

Trial Examiner Bennett: I want counsel and the witness to desist from interrupting each other and especially with this particular witness.

And I will expect that on redirect as well.

Let him finish his question before you start to answer.

Will you read the question?

(Last question and answer read.)

Trial Examiner Bennett: Ask another question.

Q. (By Mr. Bruckner): As I understand your testimony, you voluntarily gave Saturdays off, starting on October 3, 1953, without any requests from any employees. Is that correct, sir?

A. Well, it wasn't a request.

Q. You received no requests?

A. No, sir. They asked if they could have it, sir.

Q. Who asked?      A. Ruthe Jensen.

Q. When?

A. On Friday, the 24th, I think.

(Testimony of Cecil Slayden.)

Q. I see. Is that when she was talking to you in your office? [404]

A. Yes, sir.

Trial Examiner Bennett: Friday would be the 25th?

The Witness: Yes, I suppose so.

Q. (By Trial Examiner Bennett): Do you mean Friday?

A. Yes, it was on Friday, I am sure.

Q. (By Mr. Bruckner): As I understand your testimony on that, that was in response to your question of her, when you asked her, "Well, what is it the employees want?" is that correct?

A. Yes, sir.

Q. And, as I understand, she said, "Well, for one thing they want Saturdays off and more money."

A. I told her that we had given Saturdays off in the past and we were in a position at that time that we could give Saturdays off.

Q. (By Trial Examiner Bennett): Was this after she had said what the employees wanted?

A. Yes, sir.

Q. (By Mr. Bruckner): And you said you would try to work it out, is that correct?

A. That is correct.

Q. Isn't it true, Mr. Slayden, that you told her the evening before that you wanted to speak to her the next day, on a Thursday?

A. Yes, sir.

(Testimony of Cecil Slayden.)

Q. And at that time didn't you say you wanted to talk to her [405] about the union?

A. I just told her I wanted to talk to her.

Q. You didn't mention the union?

A. No, sir.

Q. Did she ask what you wanted to talk to her about? A. No, sir.

Q. What did you say to her when she arrived in your office in the morning?

A. I said, "Ruthe, what have I done to you?" I says, "Why has all of this trouble come up?"

Q. Trouble? Did you say "trouble"?

A. Well, something to that effect.

Q. To her?

A. I don't know for sure whether I said "trouble" or——

Q. What did you say?

A. Well, I just said, "Why all the confusion?"

Q. Do you think you used the word "confusion"?

A. Well, I probably did. I don't know what I did use.

Q. Yes, sir. And what did she say?

A. And she said, "Mr. Slayden", she said, "you have been awful good to us", she said, "I haven't got a bit of complaint about how good you have been to me." And I said, "What did you do it for?" and she said, "Well, they told me I could get more money."

Q. Let me stop you there for a moment. You said, "What did [406] you do it for?"

(Testimony of Cecil Slayden.)

A. Yes.

Q. Had you up until that time mentioned what you were talking about?      A. No.

Q. What were you talking about, what did she do what for?

A. Well, the troubles that I was in then.

Q. What troubles?

A. Well, you know what troubles. I was having union troubles, as far as that goes.

Q. Well, you said, "What did you do it for?" is that correct?

A. Well, I just asked her why she had been trying to cause me trouble.

Q. (By Trial Examiner Bennett): You were referring to your union trouble?      A. Yes, sir.

Q. And did she indicate that she understood what you were talking about?      A. Yes, sir.

Q. (By Mr. Bruckner): How?

A. Well, she indicated that "they"—she said "they"—I don't know who she meant by "they"—she said, "They told us we could get more money."

Q. Did you ask her whom she meant by "they"?

A. No, I didn't ask her whom she meant by "they". [407]

Q. Did you say to her then that you had found out that she was one of the main ones bringing in the union?      A. No, sir, I did not.

Q. Did you say you knew who was in the union?

A. Yes, sir.

Q. You did say that?      A. Yes, sir.

(Testimony of Cecil Slayden.)

Q. (By Trial Examiner Bennett): Did you tell her how you knew that? A. No, sir.

Mr. Bruckner: What was that answer?

The Reporter: "No, sir."

Q. (By Mr. Bruckner): Who was the one who brought up the subject of Christmas bonuses?

A. Well, they was asking for more money. They said they wanted more money, or she said they wanted more money. And I think that Ruthe Jensen was the one who brought up the subject of Christmas bonuses.

Q. Who said they wanted more money?

A. Well, Ruthe Jensen said they wanted more money.

Q. Yes. You asked what the trouble was and she said that they wanted more money and they wanted Saturdays off, is that correct? A. Yes.

Q. And what did she say, that they wanted Christmas bonuses? She brought up the subject? I don't understand. [408]

A. Well, I don't know, either, how it was brought up.

Q. Sir?

A. I don't know, either, how it was brought up. But, then, anyway I know in our discussion that I told her that that would be up to the union, whether the union got that in their contract or not, whether we gave Christmas bonuses.

Q. And, as I understand now, you are not sure now whether you brought it up or she brought it up? A. No, I didn't bring it up, no, sir.

(Testimony of Cecil Slayden.)

Q. Oh, you are sure that she brought it up?

A. Yes, sir.

Q. Who brought up the subject of a contract?

A. The contract?

Q. Yes, sir.

A. There wasn't no subject brought up of a contract.

Q. Was a contract discussed at all?      A. No, sir.

Q. Well, the word "contract" was used, wasn't it?      A. No, sir.

Q. (By Trial Examiner Bennett): I thought you just said that you referred to a "union contract".

A. Well, that is probably right, yes, "contract", if that is what you are talking about, a "union contract", and it was in the discussion. I don't know how it was brought up.

Q. (By Mr. Bruckner): What was said about "the union contract" [409] or "a contract"?

A. Well, she was just asking for more money.

Q. Yes?

A. She said she would like to have some of the better things in life.

Q. Yes?

A. And she said that the union said that their contract would get those things for her.

Q. Yes?

Q. (By Trial Examiner Bennett): What did you say?

A. Well, I told her I didn't know whether they would or not, that was up to the union, I didn't know what kind of a contract they had to offer, but,

(Testimony of Cecil Slayden.)

I said this, that if it got too steep, why, these producers couldn't stand it.

Q. (By Mr. Bruckner): At that time you mentioned the 300 to 400 poultry growers?

A. Yes, sir.

Q. Is that correct, sir? A. Yes, sir.

Q. Didn't you at that time also say that if the union came in that they might have to put in a machine in order to keep the 300 to 400 poultry growers happy?

A. I did in the respect that if the demands and wages got too high, that we may have to put in the machine to hold down the overhead to where these producers could make some money. [410]

Q. There has been some testimony that you had these plans for a machine for several years, is that correct?

A. A couple of years, yes, sir.

Q. How long, two years? A. Two years.

Q. And it was never decided that it was necessary to put in the machine?

A. No, we never did decide that it was necessary to put in the machine.

Mr. Eberle: Here (indicating).

Mr. Bruckner: What was given to the witness now?

Mr. Eberle: The plans have the date on them.

Trial Examiner Bennett: The witness was handed something by counsel.

If you do not desire to have the witness inspect

(Testimony of Cecil Slayden.)

them, I would suggest they be taken away from the witness.

Mr. Eberle: I assumed that he wanted to know when, and they bear the date.

The Witness: This says "7/16/52".

Mr. Bruckner: I am not entirely sure what is happening here, but it is my understanding, I think I know what is happening now, but I have no need of the document now.

Trial Examiner Bennett: Mr. Eberle handed it to the witness who looked it over, looked at it, and read a date from it, and the witness handed it to you and you have now placed [411] it on counsel's table.

Q. (By Mr. Bruckner): In that period of time, Mr. Slayden, there were talks about plans to put in machines to replace some of the employees, is that correct?

A. There was plans to put in the machinery along while before they ever talked to the employees. Even before we talked to the employees we had plans in our office for this machinery to candle eggs.

Q. (By Trial Examiner Bennett): It has been under consideration for some years?

A. Yes, sir.

Q. (By Mr. Bruckner): Has any decision been reached about that?      A. No, sir.

Q. Was any decision reached about that around September of 1953?      A. No, sir.

Q. No decision had been made at that time?



(Testimony of Cecil Slayden.)

A. No, sir, no decision.

Q. Nevertheless, you felt it necessary to mention this to Mrs. Jensen?

A. Providing that the demands got so great that these producers wasn't making any money, we would have to do something to cut the overhead. That was the way I mentioned it.

Q. You also mentioned, as I recall——

Mr. Bruckner: Strike that. [412]

Q. (By Mr. Bruckner): Didn't you say something to the employees about that you prefer them to deal with you directly, that they had plenty of economic power on their own?

A. I told Ruthe Jensen, I didn't say why they didn't come to talk to me, I said they could bargain with me, I am open-minded on bargaining.

Q. Yes, sir. And didn't you also tell the employees that on Saturday, September 26?

A. No, sir.

Q. You did not say that to them at that time?

A. No, sir.

Q. You say that your car is there for the use of the employees, your car there is for the use of the employees if they want it?

A. Yes, sir.

Q. Which car is this, your company car or your personal car?

A. Personal car.

Q. When was the last time before September 26 that you lent your car to employees?

A. I don't know. I didn't keep any dates on it.

Q. How often before September 26 during the year 1953 did you lend your car to employees?

(Testimony of Cecil Slayden.)

A. Oh, I would say as close as, many times as, a half a dozen times a year.

Q. Yes, sir. Were you present on October 5 when Mr. Lott and Mr. Doss came down to the plant to speak to the employees? [413]

A. No, sir.

Q. You don't know, then, if they inquired for permission to you?      A. Not——

Q. Of your own knowledge, you don't know, do you?      A. No, sir, I don't.

Q. Did you pay the employees or did the company pay the employees on Saturday, September 26, for the time they took off?      A. Yes, sir.

Q. You mentioned that it is customary, as I recall, for the employees to start cleaning up as soon as they finish the eggs they are on?

A. Yes, sir.

Q. You also stated, as I recall, that the customary time was about 11:30 on Saturdays, when they were working Saturdays——

A. Well, I think some of the girls worked later than that on regular Saturdays.

Q. Yes, sir.

A. Anywhere from 11:30 to 15 minutes to 12.

Q. And from 11:30 to——

Mr. Bruckner: Strike that.

Q. (By Mr. Bruckner): Let me put it this way, the time after 11:30, or whenever they quit, whichever is later, as I understand, or had finished their job, the time from then on until 12 o'clock was usually used in cleaning up, was it not? [414]

(Testimony of Cecil Slayden.)

A. Not always.

Q. Wasn't it customary for the girls to leave not before 10 minutes or 5 minutes to 12?

A. Yes.

Q. When did they leave?

A. They left anywhere from 20 minutes on up to 5 and 10 minutes to 12.

Q. Yes, sir. They had to clean up first, though, didn't they?

A. They didn't always do it.

Q. They were supposed to clean up?

A. Well, that is their orders, to clean out the booths each night, yes, sir.

Q. Do you remember talking to any girls out in the car on Saturday, September 26?

A. Yes, sir.

Q. Mrs. Panter, Mrs. Pharris?

A. Yes, sir.

Q. Did you tell them anything about getting Saturdays off?

A. I told them that it had, that we had had Saturdays off the year before and that our business now was down to where there was a possible chance that we could give them Saturday off.

Q. And immediately following they did start to get Saturdays off, is that correct?

A. Yes, sir.

Q. And immediately following that, as a matter of fact, didn't [415] you give an option to employees of working Saturdays, if they wanted to?

A. No, sir.

Q. They did not get that option?

(Testimony of Cecil Slayden.)

A. No, sir.

Q. Did you ever say to any of the employees, "You don't need a union; if you let me know what you want, if it is not unreasonable, I will try to get it for you"?      A. No, sir.

Q. Didn't you say that to Carrie Tofanelli?

A. No, sir. I never talked to Carrie Tofanelli personally.

Q. Well, in front of other people, in front of other employees?

A. No, I didn't talk to her in front of other employees, either.

Mr. Bruckner: That is all.

Mr. Eberle: We rest, Your Honor.

\* \* \* \* \*

## ERMA HERZINGER

a witness called by and on behalf of General Counsel, on rebuttal, having been previously sworn, was examined and [416] testified further as follows:

### Direct Examination

Q. (By Mr. Bruckner): Mrs. Herzinger, you are the same Mrs. Erma Herzinger who testified earlier in this proceeding, aren't you?

A. Yes.

Q. You know, you are still under oath?

A. Yes.

Q. Erma, you know Zina Jensen, do you?

A. Yes, I do.

Q. When you spoke to her about signing up, or

(Testimony of Erma Herzinger.)

signing an authorization card for the union, did you mention the word "firing"?

A. No, I never mentioned it.

Q. Did you say to her in words or effect that if she did not join the union she would be fired?

A. No.

Q. Did you ever say that to anybody?

A. No, sir. [417]

\* \* \* \* \*

### CERTIFICATE

This is to certify that the attached proceedings before the National Labor Relations Board for the 19th Region in the matter of: Idaho Egg Producers were had as therein appears, and that this is the original transcript thereof for the files of the Board.

ACME REPORTING COMPANY,  
Official Reporters.

/s/ By VERNON KELLER,  
Field Reporter



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IN THE  
United States  
**Court of Appeals**  
**For the Ninth Circuit**

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No. 14,700

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NATIONAL LABOR RELATIONS BOARD,  
*Petitioner,*

vs.

IDAHO EGG PRODUCERS, INC.,  
*Respondent.*

---

ON PETITION FOR ENFORCEMENT OF AN  
ORDER OF THE NATIONAL LABOR RE-  
LATIONS BOARD.

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**BRIEF OF RESPONDENT**

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ELI A. WESTON,  
J. L. EBERLE,  
Residence: Boise, Idaho  
Attorneys for Respondent

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OCT 31 1955





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Residence: Boise, Idaho  
Attorneys for Respondent



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## STATUTES

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STATEMENT OF THE CASE

The original Charge in this case was filed in September, 1953, with the hearing on the Complaint held on January 26 and 27, 1954, and the Trial Examiner's Intermediate Report was filed March 23, 1954, with this Report being approved by the Na-

tional Labor Relations Board on January 6, 1955.

The Petition for Enforcement was filed with the Court of Appeals on the 23rd of March, 1955, and the Brief for the Board was received by the Respondent on October 3, 1955.

The Order required the Respondent to

- (1) Bargain with the Union,
- (2) Cease and desist from interrogating the employees as to their membership in or activities on behalf of the Union,
- (3) Cease and desist from interfering with, restraining or coercing its employees, and
- (4) Post the usual notices showing the Decision and Order of the Board.

The Petitioner endeavors to sustain the Board's Order by arguing that a preponderance of the evidence shows that the Respondent interfered with the union's organizational campaign in the following respect:

- (a) That the Respondent interrogated the employees as to membership in the union; that the Respondent threatened the employees with loss of Christmas bonus and threatened the installation of automatic machinery if the union came into the plant and offered as an inducement the use of the company's car to employees for the purpose of withdrawing from the union and to pay the employees while using the car; and that the Respondent eliminated Saturday work as a further alleged interference with the union.



- (b) The Petitioner further argues that an uncoerced majority of the employees had designated the union as their bargaining agent and that the Respondent had refused to bargain as required by Section 8 (a) (5) and (1) of the Act.

THAT THE RESPONDENT INTERROGATED THE EMPLOYEES AS TO MEMBERSHIP IN THE UNION; THAT THE RESPONDENT THREATENED THE EMPLOYEES WITH LOSS OF CHRISTMAS BONUS AND THREATENED THE INSTALLATION OF AUTOMATIC MACHINERY IF THE UNION CAME INTO THE PLANT AND OFFERED AS AN INDUCEMENT THE USE OF THE COMPANY'S CAR TO EMPLOYEES FOR THE PURPOSE OF WITHDRAWING FROM THE UNION AND TO PAY THE EMPLOYEES WHILE USING THE CAR; AND THAT THE RESPONDENT ELIMINATED SATURDAY WORK AS A FURTHER ALLEGED INTERFERENCE WITH THE UNION.

Before answering the Petitioner's arguments in detail, Respondent would like to call the Court's attention to an important characteristic of this case that runs clear through the record and that is the fact that

(1) The organizational campaign was instigated by one or two husbands of employees working in the plant and that almost every employee that was approached was sold on the idea that all memberships

must be kept strictly secret or the plan would be abandoned (R 383).

(2) That unless all of the employees were in the union, none should be in, and that if they were not all in the union the campaign was not to proceed further,

(3) That the purpose for joining the union and signing application cards was to insure the employees of an election, and

(4) That some employees were told that if they did not join the union, they would be fired by the company.

It must be further noted that according to the record, the first knowledge of the existence of the union was given *voluntarily* by one of the employees, William Hoffman, and this knowledge was given to the management because this particular employee was dissatisfied with the way the union was proceeding in its organizational campaign. (R 203, 341, 342). The uncontradicted evidence shows that the employee Hoffman, and practically all of the other male employees as well as female, agreed that if knowledge of the organizational campaign was commuted to the employer, or if the employees did not sign 100%, or if there was not an election, the organizational campaign should be abandoned.

The record clearly shows that after information was voluntarily given to the employer by the dissatisfied employee Hoffman, and after it was shown that there was not to be any election, and after it was shown that all of the employees were

not signed up with the union, the organizational campaign immediately disintegrated and fell apart. It is particularly pertinent to note that the acts complained of were subsequent to the voluntary desire on the part of the employees to disengage themselves from the union and all of the acts complained of on the part of management were subsequent to this premise upon which the organizational campaign was based.

With reference to the loss of the Christmas bonus, the record shows that this statement together with other relevant statements, including the installation of automatic egg candling machines, was based on the economic proposition that if the union came in and made a contract which would cost the company more money, the company would have to eliminate certain free time, bonuses and other costs to the company. (R 237)

The statement by management that the company had plans in the plant safe for the installation of automatic egg candling machines was a true, accurate statement and the evidence shows that the employees were already well aware of this fact and that they knew at all times that there was a constant threat of the installation of automatic egg candling machines. (R 237, 399, 401)

It should be noted that all through the record, and particularly pages 37, 217, 177, 178 and 400, management informed the employees that the question of staying in a union or getting out of a union was entirely up to them. Other statements made by

Manager Slayden to the effect that he had never been a union man and that he hoped the matters could be worked out without involving the union and that the employees would be better off without the union are all expressions of opinion and do not constitute threats or promises.

The record shows that the manager did offer the use of the company's automobile for the purpose of going to the union hall to withdraw memberships, but in this connection it must be noted that this offer was after the employees had decided that the conditions under which they joined the union had been violated and that they had voluntarily decided to withdraw their memberships. It is also to be noted that the time off for taking the trip to the union hall, while in dispute, seems to range from one-half hour to forty minutes and the record shows that it was a customary practice to pay employees for time off if they had completed their quota of work up to the period the time off was taken. (R 272, 402) In this connection the Court should take into consideration the uncontradicted statement by the company that the automobile in question was always available to the employees and had been used on former occasions by the employees, and was made available to them. (R 401)

Much is made of the fact that the Saturday work was eliminated. Respondent feels this to be an unreasonable contention by Petitioner inasmuch as the record shows that Saturday work had been elim-

inated from time to time in previous years. (R 399, 401)

PETITIONERS CONTENTION THAT AN UNCOERCED MAJORITY OF EMPLOYEES HAD DESIGNATED THE UNION AS THEIR BARGAINING AGENT AND THAT THE RESPONDENT HAS REFUSED TO BARGAIN WITH THE UNION AS REQUIRED BY SECTION 8 (a) (5) and (1) OF THE ACT.

The Trial Examiner in his Intermediate Report and Recommended Order expresses considerable doubt as to probative value of the evidence introduced in the case. The entire record shows the testimony introduced was highly conflicting and by no means conclusive. The employees were in doubt as to why they had signed the application cards, they felt they had been imposed upon and deceived and therefore voluntarily renounced the union.

We find the following expressions from the Trial Examiner showing his doubts in the matter. On page 34 of the Record, in considering the question of giving Saturdays off or higher wages and a bonus, the Trial Examiner states as follows:

"Although I consider the resolution a close one, the foregoing findings have been made based primarily upon Jensen's testimony upon direct examination which is supported by Slayden's admissions."

Again on page 36 the following statement by the Trial Examiner:

"Here, too, there is considerable testimony of a

highly conflicting nature in the Record and I have given considerable thought to determination of what actually took place on this morning."

Again on page 41 we find the Trial Examiner in doubt as he states as follows:

"There are, in my belief, several significant disparities in the testimony of this group of witnesses which serve to cast doubt upon the reliability of their testimony."

An examination of the record as a whole will show why the Trial Examiner would consider his resolutions as very close ones as it was quite apparent by the attitude of all of the witnesses, except the promoters, that the employees had voluntarily decided to abandon the union because of the unfair and untruthful methods of organizing. Since the question was so important, the Respondent took the opportunity of having the Trial Examiner hear the testimony of every employee involved. While the Respondent was unable to find two employees, all other employees were called to the witness stand including those subpoenaed by the General Counsel but not called by him, showing the attitude and desires of the employees. After hearing these employees, it is quite easy to understand how the Trial Examiner would be confused and would admit that his resolutions were very close ones.

Freedom of choice means freedom from interference from any source whatsoever including both employer and union. There may have been a time when legal principles were not applicable to such

complete freedom in labor cases. We are all aware courts are now applying the general principles of law applicable to the constant, authorization and freedom of choice involved. Taking the overall picture and after hearing the testimony of all the witnesses, it is manifest that the union was not the voluntary and free choice of the employees, that there was no meeting of the minds and that the employees had a right to withdraw from the union or renounce the union as their representative when they did.

The union takes the position that the so-called authorization cards authorized it to represent the employees. This must be based upon a contractual relationship whether it be agency, power of attorney or other agreement. The law first requires that there be a meeting of the minds in the execution of such an agreement. The law also requires that the agreement be made freely and not upon any misrepresentations whatsoever within the general principles known as fraud. Manifestly, if such agreements had been entered into by violence or coercion, they would be set aside. So likewise if there is no meeting of the minds and if employees signed the same upon representation of facts which were not true and known by the union or its representatives not to be true at the time they were made, such agreements would be set aside with the same efficacy as if obtained by violence. In the instant case, as in the case cited below, the statements by the employees as to how they were deceived upon sign-

ing the applications was not discredited. (NLRB vs. Dadourian, 138 F2d 891, distinguishing NLRB vs Dahlstrom, 112 F2d 756, and NLRB vs Karp, 134 F2d 954.)

In the above case the Court held that where the statements made by the employees representing the union were definite and unequivocal, such as they are in the present case, that the representations constituted an interference with the employees' freedom of choice and vitiated the authorization cards, the Court stating: "We cannot agree that the statute sanctions the selection of a bargaining representative by such means. Fraud—which this was—will vitiate consent as well as violence, and the Board itself implies that a vote procured by violence should not be counted." This case was decided in 1943 and before the 1947 Amendment which would strengthen the Respondent's position.

Assuming that Velma Armstrong is within the unit there would be 27 employees of which the union claims 18 cards. If Velma Armstrong were eliminated, there would be 26 employees of which the union would have 17 cards. This count includes the two cards which the union claims it lost. In either event, the union claims a majority of 4. More than four employees can be eliminated upon any one of several grounds.

We felt that the Examiner thought that we were unduly prolonging the hearing by introducing all of the employees and asking them with reference to the back ground of their signing the cards. How-



ever, it is now apparent how important such background or premise becomes. The misrepresentations become important because there is no desire on the part of the employees to become organized and the only reason that they joined was in reliance upon the representations above mentioned, each one signing on the understanding that if the others were in they wanted to concur. Mr. Godfrey, for instance, testified that they told him everyone had signed and he was the last one. (R 378) Each of the others testified that she was told that the organizers already had a majority or that all the rest of the employees had already signed. See (R 203-240-1-3) Under the general principles of misrepresentation, these statements become important because of the background which we have just described. It was for this reason that we inquired of the organizers the order in which they approached the various employees. The examination of this order considered with the testimony of the other employees makes it crystal clear and without conflict that the representations made to these employees were false under the general rules of meeting of the minds and free and voluntary authorization. (R 259) The representations being false, the organizers knew at the time they made the statements that the same were untrue. This case therefore meets every requirement for the setting aside of such relationship based upon misrepresentation. (R 379)

In the case of Going, it will be remembered there was also thrown in the question of a possible fine.

(R 347-348) In the case of Ellsworth it was his understanding that it was merely to attend a meeting. (R 354-356) However, all through the testimony it will be noted that the employees understood that the matter would come to a vote and this is what they had in mind when they signed the cards. (R 237-350) The union proceeded accordingly and the employer consented to an election. It was the union that withdrew the election petition contrary to its original promise of a vote. It will be remembered that some of the witnesses testified to being quite disappointed and deceived about the vote being withdrawn. There is no conflict in the testimony with reference to such misrepresentations. After all of these witnesses were on the stand, General Counsel had an opportunity of putting the organizers back on to deny such misrepresentations. This he did not do. And in view of the overwhelming testimony, it is quite evident that the organizers could not deny that they made these misrepresentations to obtain authorization cards. Employee Ellsworth said he signed to have a meeting. (R 355, 356)

Although the above misrepresentations would be sufficient in any court of law, the record discloses that in more than four instances representations were also made that the purpose of the authorizations was for the sole purpose of a vote and also that if the authorizations were not signed the employee would lose her job. We are mindful of the fact that the organizers could say that if a union contract were made with a union security provision, then all

employees would have to make application for membership in the union or lose their jobs. However, this is not the testimony in this case. At least two of the witnesses testified definitely that the statement was made that they would lose their jobs without any of the qualifications required to bring it within the law. (R 322) (National Labor Relations Board vs. Dadourian E. Corporation, 138 F. 2d 891.)

There was also the representation that if the cards were not signed there would later be a \$25 fee which could be avoided by signing the cards. (R 236) It is our understanding of the law that there shall be no discrimination in the requirements for membership in the union. Undoubtedly this representation was also effective. The question again arises, can the organizers use an unlawful representation to accomplish organization by authorizations obtained under such circumstances.

Section 8 (b) (2) of the Act provides that there shall be no discrimination with reference to admission of employees to membership in the union. The General Counsel, in an Administrative Opinion No. 133 (1951) stated that where there was no evidence that the initiation fee would be raised there would be no violation of Section 8 (b) 2. Respondent contends that there is evidence in this case that the union intended to discriminatorily raise the initiation fees at a later date.

In the Ferro Stamping and Manufacturing Company case (1951) 93 NLRB 1459, the Board held

that where the union had exacted discriminatory initiation fees from certain employees the same were ordered returned so that all employees would come into the union on the same basis.

Now let us approach the so-called coercion and offer of benefits alleged by General Counsel. Although the allegations are that such threats and promises were made to the employees, it is now apparent by the case introduced by the General Counsel that the only person to whom the manager talked with reference to such matters was Ruth Jensen. As is the case in most hearings, the witnesses do not all remember the circumstances in the same light. However, taking this case as a whole, and particularly the testimony of the witnesses who seemed most intelligent and nonpartisan, it is apparent that when the manager talked to the girls first on Saturday morning it was early in the morning and he merely told them to get back to work but also stated *if they wanted to join or not to join the union it was up to them to decide.* (R 260) Then word was sent to him that the employees wanted to withdraw from the union. He then went down and told them that if any of them wanted to do so they could do so as soon as they finished their work and that if they had no transportation they could use his car. It was custom and practice to pay for time off at end of shift if quota had been made. (R 402)

There is conflict in the testimony about what the manager did say to Ruth Jensen. There was mention of the machine and Saturdays off. There was

no denial however that the question of the machine was merely a matter of economics and that the manager told Ruth that if wages raised to the point where it was uneconomical, he would have to put the machine in. (R 237) So likewise with Saturdays, if it was feasible in view of the season load, he would do the same as he had done the summer before. However, regardless of this conference, Ruth did not go to him as a representative of the employees. She said she went on her own. The manager did not talk to her as representative of the employees. Some of the witnesses said they talked to Ruth and it was Ruth that told them that the girls generally wanted to withdraw. In any event, the employer made no statements, promises or threats to the employees. (R 257-8, 278, 289, 329, 360, 367, 370) Here again is further corroboration of the back ground originally mentioned herein that most of the employees had no particular interest in the union. The Examiner will remember that several testified that the day after they signed, they were sorry that they had signed and in one case the employee asked for her card to be returned. It was corroborated. Statements were made that the employees only were willing to join if all the rest of them did. When some of them wanted to withdraw, the rest of them likewise fell in line. In other words, they then all wanted to withdraw. There is no testimony that such a desire to withdraw was coerced or influenced in any way by any statement made by the manager. (R.260)

In the case of *NLRB vs. Mayer*, 196 F. 2d 286, a case decided in 1952, the Fifth Circuit Court of Appeals holds that up to the time of a certification by the Board, the Respondent is authorized and permitted to accede to the wishes of the majority of his employees. This case also held that while the employees have the right to designate their collective bargaining agent, they also have the right to revoke the designation.

On page 289 of the above case the Court distinguished the case of *NLRB vs. Mexia Textile Mills*, 338 US 563, and the case of *NLRB vs. Sanson Hosiery Mills*, 195 F. 2d 350, on the grounds that those cases decided that an employer who was in doubt was taking a chance by not recognizing the union. In the *Mayer* case, as in this case, there is no doubt in the mind of the employer as the expression by the employees as of Saturday, September 26th, made it very clear that the employees did not wish to be represented by the union.

The Court, in the *Mayer* case, referred to the case of *NLRB vs. Hollywood-Maxwell Co.*, 126 F. 2d 815, headnotes 7 and 9, as follows: "If we should compel the respondent to bargain further with this union, which the employees themselves have obviously repudiated, the result would be to deny them the right, secured by the Act, to bargain through the representative of their choice . . . . It has been held that the employer can do this, even where the bargaining union has been duly certified by the Board."

In the Mayer case as in this case the employees wanted the matter decided by an election. In the Mayer case the employer filed a petition for an election but the same was denied by the Regional Director and Unfair Labor Charges were filed.

As heretofore pointed out, we believe that the authorization cards were not valid because they were not the free and voluntary act of the employees and were obtained by misrepresentation. However, even though at the time they were handed to the organizers, these cards were valid, nevertheless at the time that the employees requested withdrawal they were entitled to do so and Mr. Lott had no right to refuse them. *It is significant that at that time he told them it would have to come to a vote.* Having used this representation as a ground for refusal to permit withdrawal, the union then proceeds to further deceive the employees by withdrawing its petition for an election.

The position of General Counsel is that the Examiner should infer from the circumstances that the statements of the manager had the effect of interference by reason of threats and promises. In other words, that the Examiner must infer that the interference was both the objective of the manager but was also effective upon the employees. With reference to the object of any remarks made by the manager, it will be noted that throughout the entire hearing, every witness testified that in every instance where the manager said anything, he also said that whether any employee joined the union

or did not join the union was optional with such employee, that it was the choice of the employee. This is uncontradicted by any of the organizers. Now as to the effect of any statements by the manager, as above stated General Counsel asked the Examiner to so infer. *It was for this reason that we asked the witnesses of the effect, if any, the statements made by the manager had upon such employee.* The Examiner permitted the answer with the comment that there was a question as to such subjective testimony. It is our contention that the Examiner must either infer the subjective state of mind of the employee or rely upon the statement of the employee as to the subjective state of her mind in fact. There was certainly nothing in the demeanor of the employees to indicate that they were under the influence of any pressure from anyone when they testified that their decision to withdraw was not influenced in fact by any statements of the manager. The question then is, can an Examiner infer a state of mind contrary to the positive testimony of the person involved as to a state of mind. However, this is again only corroborative of the situation hereinbefore described and it is manifest that the employees had determined to withdraw before the manager was notified and then he offered to assist if his car was necessary, which offer no employee accepted. In other words, in view of the whole picture, certainly no useful purpose could be served by any attempt to force either the employer or these employees to now bargain.



This case presents a good example of the dangerous practice of interfering with an employees right to vote by depriving him of his freedom of choice through an election. The evidence shows that the union, by deceptive and pressure tactics, obtained signatures from seventeen reluctant employees and was holding them by a very flimsy thread until the employees discovered they had been deceived. Upon discovering the union's tactics the employees decided to renounce the union as their bargaining agent. If there has ever been a case where the value of the right of election is apparent, this is such a case.

The Respondent has no fault to find with the holdings that where the employer, by its overt acts, deliberately scuttles the union by threats and promises thereby preventing a fair election, but that is not true in this case. The Respondent subscribes to the statements of the Chairman of the National Labor Relations Board as made in the case of Southeastern Rubber Manufacturing Company, Inc., 106 NLRB 157, Case No. 10-CA-1578, decided August, 1953, when he stated as follows:

"It is not, nor could it be, claimed that on the foregoing facts alone the Board should hold the (employer) guilty of refusing to bargain with the majority representative of its employees. Signatures to applications for union membership, obtained in the course of personal discussions of the pros and cons of collective bargaining, are unreliable as evidencing the employees' considered de-

sires. It is for this basic reason that the statute provides for government-supervised tests of the employees' choice, and it seems to me plain that, except in extraordinary circumstances, we ought not substitute a doubtful test for a conclusive one."

The incidents in this case date back to the summer of 1953 and take place in a plant employing unskilled female help and we think it reasonable that the Court take judicial notice that this type of help is transient and not particularly stable and subject to a rapid turnover. This group of employees has no particular community of interest, is not skilled, not a member of a craft and very loosely held together, if at all. Under these circumstances, wouldn't it have been better and more equitable, for the Board to have conducted an election, if not at the time of the hearing, at a later date when the atmosphere would have been appropriate?

#### DELAY ON THE PART OF THE BOARD IN FILING ITS PETITION

The Respondent is familiar with the pronouncements of the Courts in the cases of NLRB vs. Norfolk Shipbuilding and Drydock Corp., 172 F2d 812, NLRB vs. LaSalle Steel Co., 178 F2d 829, which also follow the statement by the Supreme Court in the case of NLRB vs. Pool Manufacturing Co., 339, US 577, all of which in effect hold that a delay on the part of the Board in filing a petition is no defense to the petition by the Respondent. In deciding the Norfolk Shipbuilding case and LaSalle Steel Co.

case, the Court held that while the Court would not exercise its injunctive power except in accordance with equitable principles, there was no violation of equity in that case inasmuch as the employer could have protected himself by filing a petition with the Court of Appeals prior to the time the petition was filed by the Board, and secondly that there was no hardship shown on the part of the employer.

In the Pool Manufacturing Co. case (*supra*) the Supreme Court did not pass upon the question of whether a period of delay through its length alone might mature into a denial of an enforcement decree or make necessary the introduction of additional evidence, but did hold that the case before it did not violate equity, and showed no hardship on the employer. The Supreme Court cited in its opinion the case of *NLRB vs. Eanet, et al*, 179 F2d 15.

In the *Eanet, et al*, case, the Court of Appeals for the District of Columbia held that where the National Labor Relations Board petitions the Court to enforce its Order, *enforcement must appear to be presently desirable*, and when the Order is based on data two years old, there should be some reasonable indication that the Decree enforcing the Order is warranted, the Court stating as follows:

“An enforcement order of this court is a serious exercise of judicial power and, once such an order is issued, we intend it to be observed, literally and without equivocation. We feel that we must take a realistic view of the present case. There would be nothing realistic, in our view, in direct-

ing these respondents to bargain collectively with a named union on the basis of a showing that more than two years ago the union had been selected by six out of nine or ten bellboys, maids and a houseman in this small hotel. We, therefore, decline to issue the enforcement order.

“If it be that the conditions found to have existed in April, 1946, continue to exist, the Board can easily bring its information up to date. If the employees wish to organize, or if the union claims to represent a majority, an election ought to be requested.”

It would appear from the above cases that this Court has a right to ask the Board to show that enforcement of its order is equitable and reasonable at the time the petition is filed. We appreciate that matters that have transpired since the record was made in this case are not before this Court, but in light of the opinion in the *Eanet, et al*, case (*supra*) we feel justified in stating that since the record was made in this case the employees have sought unsuccessfully by a petition to the National Labor Relations Board to have the question of representation determined by an election and that the Respondent has also unsuccessfully requested an election to be held among its employees to determine the question of representation and that these requests have been turned down by the Board. Certainly after two and a half years a request of this kind from the employees by way of petition is not an unreasonable request in light of the decisions above referred to.

There is a marked difference in this case as compared to either the Norfolk Shipbuilding case (supra) and the LaSalle Steel Co. case (supra) or the Pool Manufacturing Co. case (supra) on the question of whether or not the employer was guilty of laches in failing to file a petition on its own behalf. In the instant case the record shows that the organizational campaign started in the summer of 1953, the hearing was held in January of 1954, the Intermediate Report was filed in March of the same year, but the Order of the Board was not filed until January, 1955. Up until that time the Respondent *could not go into court if it wanted to* and we think the Court of Appeals should consider this fact seriously particularly in face of the flimsy and untenable hold that the union had on its slim majority. A further showing of unreasonable delay is evidenced by the fact that the petition was filed in March, 1955, but the brief by the Board was not received until October, 1955, a further delay of seven months.

As stated above, several changes have transpired during these long delays over which the Respondent has had no control. In the cases cited above on this point, the Court stressed the fact that no particular harm would result in enforcement. If the intervening facts were disclosed to this Court it would show that harm would result by the enforcement of this decree. In this case the employees have, by petition to the Board, signified their desire to be no longer represented by the union for purposes of collective bargaining and an enforcement of the order would

infringe upon that right which would certainly constitute a hardship.

The question of unreasonable delay in equity proceedings is referred to in the case of *New Standard Publication Co. vs. Federal Trade Commission*, 194 F2d 181, in which the Fourth Circuit Court held that orders of an administrative agency must be based on evidence giving them reasonable support and such support is not given for orders relating to present and future unfair trade practices but evidence relating only to transactions which occurred many years before it was entered, also holding that where the injunctive power of the Court is exercised for enforcement of an administrative order, the order must be appropriate for present enforcement. In rendering its decision the Court referred to the *NLRB vs. Eanet, et al*, and *NLRB vs. Norfolk Shipbuilding and Drydock Co.* cases (*supra*), the Court stating in this case as follows:

“No one would contend that a cease and desist order should be upheld if all the evidence supporting it related to business practices which occurred ten years before the filing of a proceeding.”

In this case, the order of the Commission was vacated without prejudice to the entry of such order as might be appropriate under *present circumstances*.

In the case of *NLRB vs. National Biscuit Co.*, 185 F2d 123, the Third Circuit, in a Per Curiam Decision, held that a National Labor Relations

Board order is not enforced unless enforcement is consistent with the principles of equity. In that case, as in the present case, certain parts of the order had been complied with (in the present case the Respondent has posted a part of the required notice of the Board). The Court stated as follows:

“The powers conferred upon this Court by the National Labor Relations Act to enforce the orders of the Board are equitable by nature and may be invoked only if the relief sought is consistent with the principles of equity.”

In this case the petition was granted in part and denied in part.

In the case of *NLRB vs Warren Co.*, 214 F2d 481, on a petition for contempt, the Fifth Circuit denied the petition in a case very similar to the present case. In that case, as in this case, the Respondent had complied with certain parts of the order and refused to comply with the part of the order requiring the Respondent to bargain with the union on the grounds in that case as in this case that a majority of the employees had repudiated the union and petitioned for the decertification, the loss of the union majority being due to a natural turnover among the employer's personnel.

In that case the Court denied the petition for contempt and in that case as in this case the Respondent requested the Board to take proper steps to inquire into and determine the question of union representation and the Board refused to do so. On this question the Court stated as follows:

“\*\*\* the respondent in good faith determined that it would be unlawful, unwise, and unfair for it to bargain with the union, and that it would not be contemptuous of it to refuse to bargain with it as representative of its members. Under these circumstances, we think that the Court, instead of vindicating, would stultify, itself and its decree and do violence to the Act if it ordered the employer to force upon its employees as bargaining agent a union not of their own choosing merely because some six years before the Board had ordered the employer to recognize it as bargaining agent for its then employees.”

In this case the Court referred to NLRB vs Al-dora Mills, 197 F2d 265, the Court in that case stating as follows:

“Our examination of the record made in this proceeding in the light of the briefs of the parties, \* \* \* and of the controlling decisions, leaves us in no doubt that the respondent, in declining to continue bargaining with the union as ordered by our decree, acted in the utmost good faith and in the sound belief engendered by the decertification petitions and the notices and information it had received from its employees that it was proper under the Act and our decree for it to do so.”

In this case the Court distinguished its own case of NLRB vs Sanson Hosiery Mills, 195 F2d 350.

Before concluding this Brief, we wish to call the Court's attention to the fact that the Respondent was denied the right of oral argument before the



Board. (R. 78) One of the chief complaints to the National Labor Relations Act and its administration is the fact that the employer is deprived of his day in court. In most cases the employer is not given an opportunity to argue his side of the case in court for a year or longer after the case is started by the Board and it is the feeling of this Respondent that had we had an opportunity to appear before the Board and orally present the facts and circumstances which we are presenting in this Brief, and had we had an opportunity to explain orally to the Board the Respondent's position, a different ruling might have ensued and this petition would not have been filed.

### CONCLUSION

This case rests upon a consideration in equity of the following:

(1) In light of the dissension and dissatisfaction among the employees with their union representative and the flimsy, questionable hold that the union had on its slight majority, and in view of the fact that there was no meeting of the minds on the question of why or under what circumstances the employees signed the union application blanks, is it fair and equitable, to order the Respondent to bargain with the union without an election?

(2) Since this proceeding is in equity, is it equitable to require the employer to bargain with the union almost two and a half years after the original request was made under a record where the Trial Examiner himself admits that most of the points

in controversy are close and difficult to decide and where he admits the witnesses contradict themselves?

The Respondent feels that the proper procedure in this case would be for the Board to conduct an election as was requested by both the employees and the employer and to determine by that method whether or not the employees wish to have the union as their representative at this time.

The Respondent asks that the Petitioners application be denied.

Respectfully submitted,

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Dated: October, 1955.

## APPENDIX

The relevant provisions of the National Labor Relations Act as amended (61 Stat. 136, 29 U.S.C. Supp. IV, Sec. 151, et seq.) are as follows:

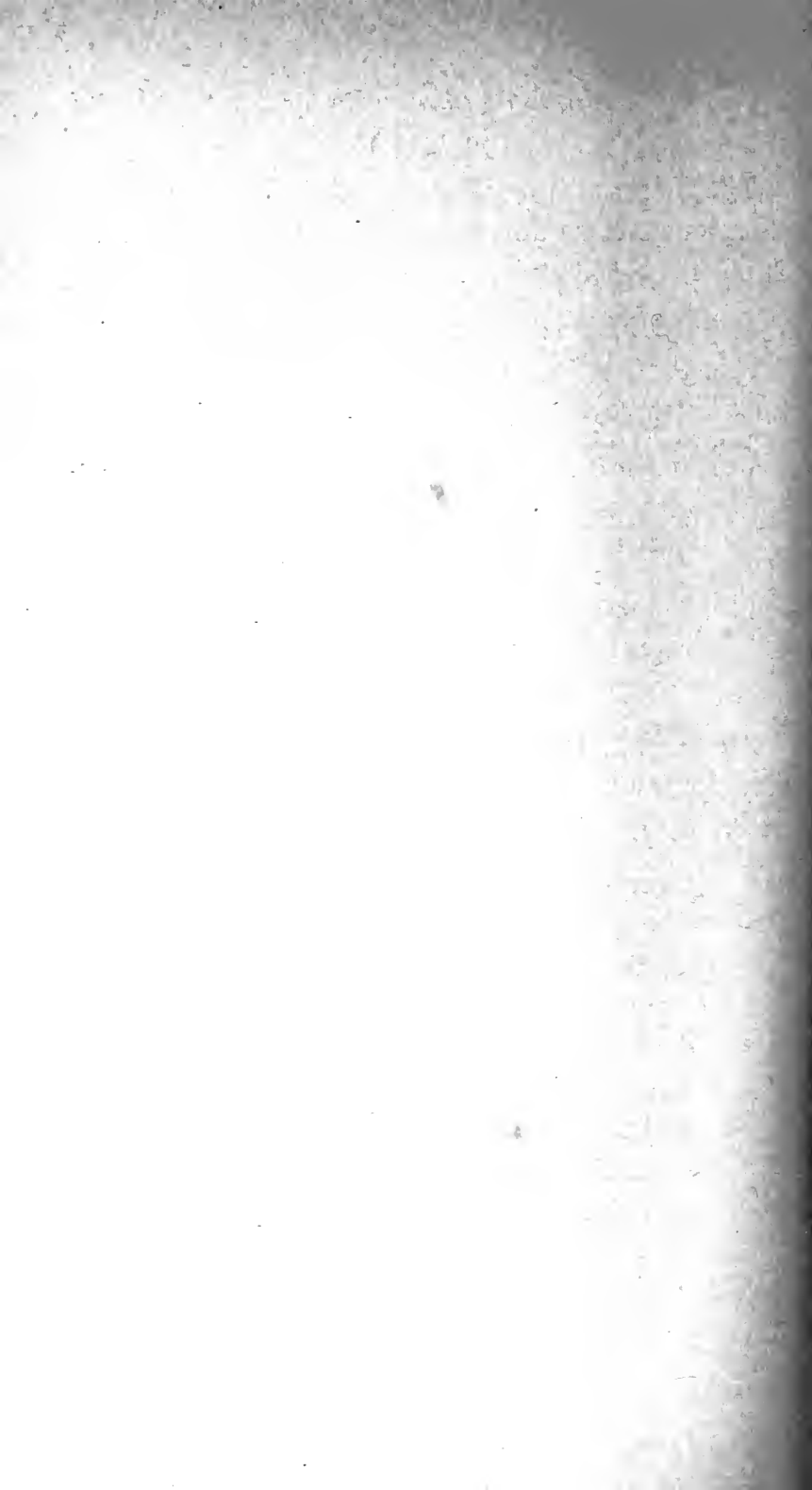
## UNFAIR LABOR PRACTICES

Sec. 8. (a) It shall be an unfair labor practice for an employer—

- (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
- (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

Sec. 8 (b) It shall be unfair labor practice for a labor organization or its agents—

- (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.



No. 14700

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**In the United States Court of Appeals  
for the Ninth Circuit**

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**NATIONAL LABOR RELATIONS BOARD, PETITIONER**

**v.**

**IDAHO EGG PRODUCERS, INC., RESPONDENT**

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**ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD**

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**BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD**

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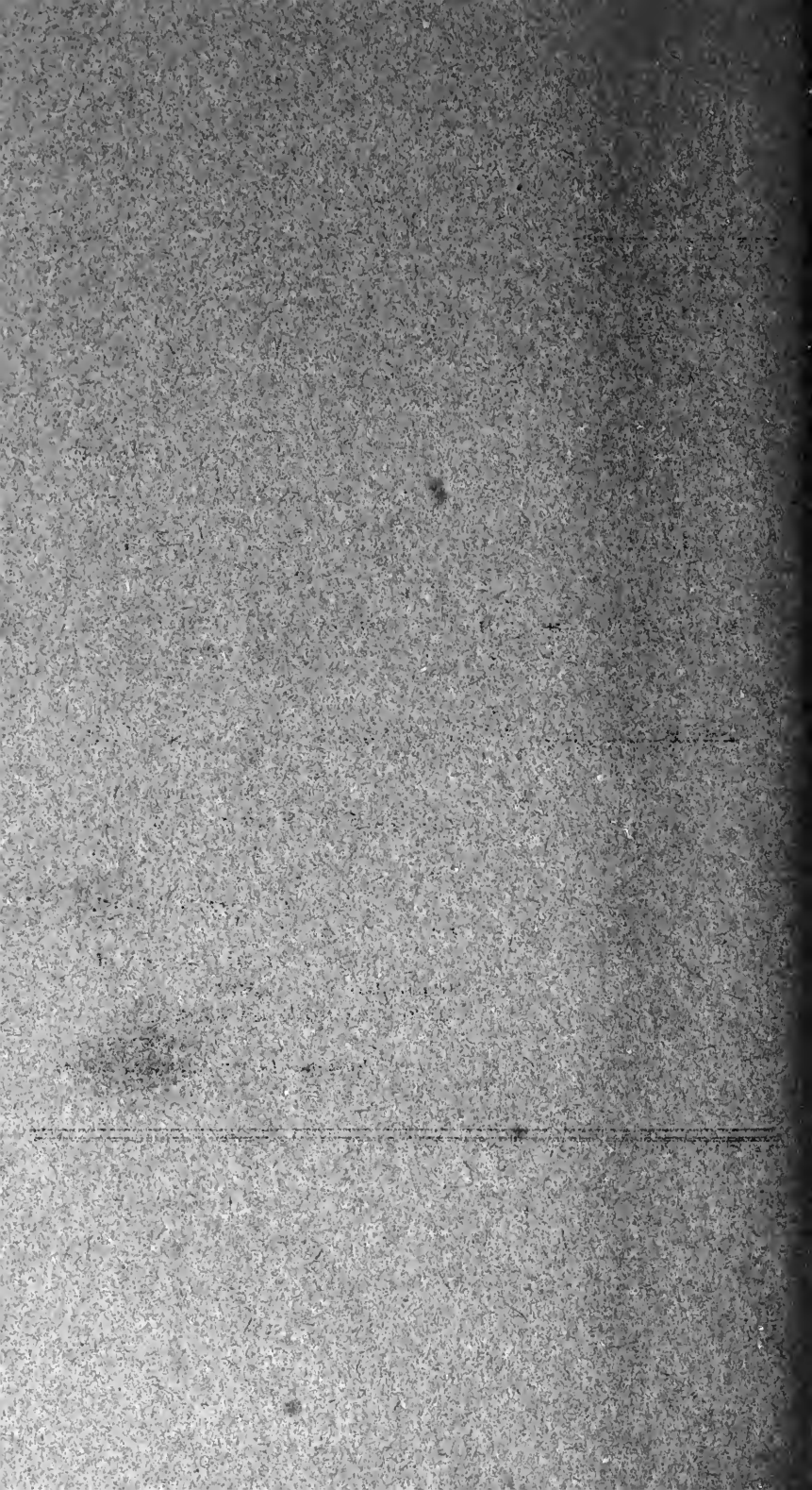
*National Labor Relations Board.*

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**FILED**

**SEP 30 1955**

**PAUL P. O'BRIEN, CLERK**



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# **In the United States Court of Appeals for the Ninth Circuit**

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No. 14700

**NATIONAL LABOR RELATIONS BOARD, PETITIONER**

*v.*

**IDAHO EGG PRODUCERS, INC., RESPONDENT**

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**ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD**

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**BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD**

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## **JURISDICTION**

This case is before the Court upon the petition of the National Labor Relations Board pursuant to Section 10 (e) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Section 151 *et seq.*),<sup>1</sup> for enforcement of its order (R. 77-81)<sup>2</sup> issued on January 6, 1955, against Idaho Egg Producers, Inc., following the usual proceedings under Section 10 of the Act. This Court has jurisdiction of the proceeding, the unfair labor practices having occurred at Pocatello, Idaho, within this judicial cir-

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<sup>1</sup> The pertinent provisions of the Act are appended hereto (pp. 19-20, *infra*).

<sup>2</sup> References to the printed record are designated "R". References preceding a semicolon are to the Board's findings; references following a semicolon are to the supporting evidence.

cuit.<sup>3</sup> The Board's Decision and Order is reported at 111 NLRB No. 12.

## STATEMENT OF THE CASE

### I

#### The Board's findings of fact

Briefly, this case concerns respondent's refusal to bargain with the Union and its attempt to destroy the Union's majority status by interrogating its employees concerning their union activities, threatening its employees with loss of existing benefits, granting benefits to discourage union membership, and granting time off with pay so that the employees could withdraw from the Union. The Board found this conduct to be in violation of Section 8 (a) (1) and (5) of the Act. The subsidiary facts upon which these findings rest may be summarized as follows:

#### A. The employees authorize the Union to represent them

In September 1953, the Union<sup>4</sup> initiated an organizational campaign (R. 26; 94-95, 128-129). In order to keep their activity a secret, organizers Irma Herzinger, Ruthe Jensen and Donna Christenson, employees of respondent, canvassed other employees at their homes (R. 26; 297, 222, 194). Although Herzinger, Jensen and Christenson were able to reach many of the employees in this manner, as of Sep-

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<sup>3</sup> Respondent, an Idaho corporation, is engaged in the marketing of eggs and poultry at five plants in the State of Idaho. In the course of these operations, respondent purchases and sells materials of substantial value across state lines. Respondent admits that it is engaged in commerce within the meaning of the Act, and thus no jurisdictional issue is presented (R. 25; 2, 6, 92-93).

<sup>4</sup> Teamsters, Chauffeurs and Helpers Union, Local 983, AFL.

tember 22 a majority had not signed with the Union (R. 26; 16-20). On the evening of September 22, Union Secretary-Treasurer Clarence Lott conducted a meeting to explain the Union's program and to obtain further signatures (R. 26; 94, 128). The meeting was attended by 18 or 19 employees (R. 26; 95, 122). With the additional cards signed during this meeting, a total of 18 out of respondent's 27 employees had signed cards specifically designating the Union as their collective bargaining representative (R. 51-52, 26; 16-21, 306, 270, 302, 173-174, 250-251, 336-337). Union Representative Lott explained that the next step would be to notify respondent that a majority of the employees had signed Union authorization cards, and if respondent would acknowledge this fact, negotiations would commence at once; otherwise, there would have to be an election (R. 26-27; 95-96, 130). Some concern was expressed by the employees lest the names of card signers be divulged to management, but Union Representative Lott assured them that the Union would not reveal any of their names (R. 27; 131). Lott said it would be necessary, however, for the cards to accompany a representation petition to the Board in order to demonstrate support of the Union by the employees (R. 27; 131, 95).

**B. Respondent rejects the Union's request to bargain, and the Union files a representation petition with the Board**

On September 23, the Union notified Plant Manager Cecil Slayden that a majority of the employees had signed Union cards and requested that respondent recognize the Union as their collective bargaining agent (R. 27; 8). Slayden replied by letter, refusing

to bargain with the Union on the ground that bargaining was not within his "jurisdiction," and referring the Union to respondent's Caldwell, Idaho, office, located approximately 200 miles from Pocatello (R. 28; 59-60, 11). On September 24, the Union filed a petition with the Board seeking an election to determine its status as bargaining representative (R. 28; 9-10).

**C. Respondent engages in interference, restraint and coercion designed to destroy the Union majority**

On the morning of September 23, William Hoffman, one of the employees who attended the Union meeting of the previous evening, gave Manager Slayden a full report of what transpired at the meeting (R. 30, 33; 363-364, 379, 204, 2223-224, 263).

Shortly thereafter, Slayden asked Employee Ruthe Jensen to come to his office and "have a talk" (R. 31; 397, 222, 411). On Jensen's arrival at the manager's office, Slayden said that he had heard from "other sources" that she was "one of the main ones in this Union" (R. 31; 222). The manager claimed that he also knew the names of all the employees who had signed Union cards (R. 31-32; 223, 412). When Jensen challenged this statement, the manager sent for Employee Hoffman to verify it (R. 32; 223). A few minutes later Hoffman came in and admitted, in Jensen's presence, that he had given the names of Union adherents to Slayden (*ibid*). The manager asked Jensen "What did you do it for? \* \* \* What have I done wrong that you have gone and gotten the union?" (R. 32; 412, 232-233). Jensen replied that the em-

ployees would like to have Saturdays made a holiday (R. 32; 399, 224). Manager Slayden said that he thought this could be "worked out" (R. 32-33; 399). As far as other matters were concerned, Slayden suggested that the employees could "bargain with me, I am open minded on bargaining" (R. 31-32; 417, 411). At the same time Slayden warned that if the Union came into the plant the employees might lose their Christmas bonus (R. 32; 223, 398-399, 415). He also reminded Jensen that there already were plans in the plant safe for the installation of automatic egg candling machines and that respondent would go ahead with them if it became necessary (R. 32; 223, 415, 133, 102). When Jensen returned to her work station she related Slayden's remarks to the other employees (R. 33; 224, 293-294, 247), and the employees "then and there" began to talk of withdrawing from the Union (R. 33; 170, 245).

On September 24, Manager Slayden also asked Donna Christenson what [she] knew about the Union?" (R. 33-34; 194). Although a leader in the Union's drive to get members, Christenson disclaimed any knowledge of the organization other than "gossip" she had overheard from the other employees (R. 34; 194). But Slayden contradicted her and said that his "sources" had informed him that she was one of the Union's leaders (*ibid*). Slayden repeated to Christenson his warning to Jensen that if the Union became the bargaining representative Christmas bonuses would be eliminated (R. 34; 194-195). Later in the day,

Foreman Talbot also sought information about the Union from Christenson (R. 35-36; 198-199). Talbot pointed out that Manager Slayden knew the names of the Union adherents and warned that if the Union did come in, "It was going to be a lot harder for everyone" (R. 36; 199).

On Saturday morning, September 26, Manager Slayden appeared in the egg candling room where the female employees worked (R. 36-37; 210, 177). Slayden announced that the question of "staying in a union or getting out of a union," was a matter for the employees themselves to decide (R. 37; 217, 177-178), but he stated that "all the Union could do is cost [the employees] dues" and that they would be better off without it (R. 37; 178). Slayden added that he had decided to grant their request for Saturdays off, and repeated that respondent could install labor-saving machinery if it became necessary (R. 37; 179, 212-214, 178-179, 283-284, 388, 419). In closing, Slayden stated that he had never been a "union man," and still hoped that they "could work it out together without involving the Union" (R. 37; 225-226, 214-215, 391). After Slayden left, Carrie Monroe, one of the employees, said they were in "a lot of Dutch" and that Slayden could "fire the whole crew and get a new bunch in" (R. 386-387, 395-396).

Within an hour, Manager Slayden received word that considerable sentiment existed among the employees in favor of withdrawing from the Union (R. 37-38, 401). Slayden visited the egg candling area

a second time, and informed the girls that they could leave at once for the Union hall to withdraw their cards (R. 37-38; 401, 250). The manager added that the employees could use his automobile and that they would be paid until the noon closing hour (R. 38; 401, 226, 275, 295). A group of employees left immediately for the Union hall with the intention of withdrawing their own cards and then telephoning other employees as to the procedure to be followed (R. 38; 216, 268). However, the Union hall was closed and one of the employees telephoned word of this back to Manager Slayden (*ibid.*). The employees received pay until noon of September 26, although the last employee finished work by 11:00 A. M. (R. 39; 418-419, 190).

Thereafter respondent eliminated Saturday work, thus remedying the very condition which employee Jensen had stated to Manager Slayden as the primary reason for joining the Union (R. 39; 418-419, *supra*, p. 4).

**D. Following the foregoing unlawful conduct, respondent consents to an election, but the Union withdraws its petition**

On October 1, respondent agreed to allow a Board-conducted election among its employees (R. 29; 11-12). However, on October 29, the Union requested permission to withdraw its representation petition; and on November 2, the Board granted the permission (R. 29-30; 112). Shortly thereafter, the Union initiated the instant proceeding.

## II

**The Board's conclusions and order**

Upon the above facts and the entire record, the Board unanimously agreed with the Trial Examiner that respondent had interfered with, coerced and restrained its employees in violation of Section 8 (a) (1) of the Act. In particular, this finding was based on: (a) Manager Slayden's interrogation of employees Jensen and Christenson concerning the Union; (b) his statements to employees Jensen and Christenson that he knew the names of Union adherents and that they were leaders in the Union movement; (c) his repeated threats to install labor-saving equipment and take away the employees' Christmas bonus if the employees selected the Union; (d) his attempt to bargain directly with the employees; (e) Foreman Talbot's questioning of employee Christenson about the Union; (f) his warning to employee Christenson that he knew the names of Union adherents and that the Union would make it "a lot harder for everyone;" (g) the elimination of Saturday work to discourage Union activity; and (h) the grant of paid time off for the purpose of withdrawing from the Union (R. 46-48, 78).

The Board and the Trial Examiner further found that at the time of the Union's bargaining request, it represented an uncoerced majority of respondent's employees in an appropriate unit, and that respondent refused to bargain, not because of a good faith doubt of the Union's majority but because of a desire to undermine the Union by committing unfair labor practices (R. 51-57, 78). Accordingly, the Board and the



Trial Examiner concluded that respondent's refusal to bargain with the Union was in violation of Section 8 (a) (5) and (1) of the Act, and that respondent's unilateral fulfillment of its promise to eliminate Saturday work likewise violated Section 8 (a) (5) of the Act (*ibid.*).

The Board's order directs respondent to cease and desist from the unfair labor practices found, to bargain with the Union upon request, and to post appropriate notices (R. 78-80).

## ARGUMENT

### I

**Substantial evidence on the record considered as a whole supports the Board's finding that respondent interfered with, restrained, and coerced its employees in violation of Section 8 (a) (1) of the Act**

The facts summarized above establish that respondent interrogated its employees concerning their union activities, threatened to withhold benefits and to install labor-saving equipment if the employees selected the Union to represent them, granted benefits designed to discourage union activity, and gave employees time off with pay for the purpose of withdrawing from the Union. That such conduct constitutes interference, restraint, and coercion violative of Section 8 (a) (1) is too well-settled to require discussion. See, e. g., *N. L. R. B. v. Radcliffe*, 211 F. 2d 309, 311-313 (C. A. 9), certiorari denied, 348 U. S. 833; *N. L. R. B. v. West Coast Casket Co.*, 205 F. 2d 902, 905 (C. A. 9); *N. L. R. B. v. Parma Water Lifter Co.*, 211 F. 2d 258,

262 (C. A. 9), certiorari denied, 348 U. S. 829; *N. L. R. B. v. Geigy Co.*, 211 F. 2d 553, 557 (C. A. 9), certiorari denied, 348 U. S. 821; *N. L. R. B. v. Shannon*, 208 F. 2d 545, 548 (C. A. 9); *N. L. R. B. v. Andrew Jergens Co.*, 175 F. 2d 130, 135-136 (C. A. 9), certiorari denied, 338 U. S. 827.

Respondent defended its statements with respect to the installation of labor-saving devices on the ground that long before the advent of the Union such automation was anticipated. Respondent also argued that Manager Slayden did not specifically state that he would discontinue Christmas bonuses but merely made the employees aware that any future bonus would depend on the Union contract which might be entered into (R. 46; 415). Even assuming this version of the facts to be correct, "it did not justify respondent in making the anticipated events the subjects of threats and allurements to force abandonment of the Union by the employees." *N. L. R. B. v. Parma Water Lifter Co.*, 211 F. 2d 258, 262 (C. A. 9).

Before the Board, respondent also urged that "while the employer may have been guilty of indiscretions and improper statements, they had no influence whatsoever on the employees." (Exceptions, p. 6.) Under settled authority, however, it is "not necessary to show duress but only interference, and it is not necessary that the interference shall be successful" (*Rapid Roller Co. v. N. L. R. B.*, 126 F. 2d 452, 457 (C. A. 7), certiorari denied, 317 U. S. 650). "The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the

free exercise of employee rights under the Act.” *N. L. R. B. v. Illinois Tool Works*, 153 F. 2d 811, 814 (C. A. 7).<sup>6</sup> In any event, respondent’s contention that the employees’ freedom was not adversely affected is rebutted by the mass retreat from the Union which actually took place.<sup>7</sup> It was therefore reasonable for the Board to attribute the employees’ change of heart to respondent and to infer that the above detailed “acts of interference, restraint and coercion, constituted an attempt to undermine and destroy the Union’s position as majority bargaining agent” (R. 61).

## II

### **Respondent’s refusal to bargain with the Union violated Section 8 (a) (5) and (1) of the Act**

At the time of the Union’s bargaining request in this case, it had been authorized by 18 of respondent’s

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<sup>6</sup> Accord: *Radio Officers’ Union v. N. L. R. B.*, 347 U. S. 17; *N. L. R. B. v. Link-Belt Co.*, 311 U. S. 584, 588; *N. L. R. B. v. Donnelly Garment Co.*, 330 U. S. 219, 231; cf. *N. L. R. B. v. Walt Disney Productions*, 146 F. 2d 44, 49 (C. A. 9), certiorari denied, 324 U. S. 877; *N. L. R. B. v. Grower-Shipper Vegetable Ass’n*, 122 F. 2d 368, 376 (C. A. 9).

<sup>7</sup> That the enfeeblement of the Union was attributable to respondent’s “indiscretions” is demonstrated by the testimony of employee Pharris (R. 217) :

Q. (By respondent’s counsel) Did you hear him tell the group down there that the question of joining a union or staying in a union or getting out of a union was entirely up to you people?

A. Yes, he did say that. But the girls were afraid to stay in the union, part of the girls were going to drop out because they were scared. Well, then the other girls figured they might as well because if part of them were going to drop out they were surely going to lose, the union wasn’t going to get in, so they were scared, if they left their names in, they were going to get fired, so they just wanted to withdraw their names, too.

27 employees to act as their bargaining representative.<sup>8</sup> Respondent, however, countered the Union's bargaining request with the campaign of interference, restraint, and coercion described above. After ascertaining that its unlawful tactics had apparently succeeded in destroying the Union's majority, respondent consented to an election, but the election did not take place because the Union with the consent of the Board withdrew its representation petition. This Court has repeatedly held that under these circumstances the employer whose unlawful conduct prevented the holding of a fair election must bargain with the Union if it represented a majority at the time of its initial bargaining request. *N. L. R. B. v. Trimfit*, 211 F. 2d 206, 209-210; *N. L. R. B. v. Geigy*, 211 F. 2d 553, 556, certiorari denied, 348 U. S. 821; *Motorola, Inc. v. N. L. R. B.*, 199 F. 2d 82, certiorari denied, 344 U. S. 913; *N. L. R. B. v. W. T. Grant Co.*, 199 F. 2d 711, certiorari denied, 344 U. S. 928; *N. L. R. B. v. Howell Chevrolet Co.*, 204 F. 2d 79, 85-86,

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<sup>8</sup> The cards of 16 employees were submitted in evidence (R. 51; 16-21). In addition it is undisputed that two other cards, those of Carrie Monroe and Nina Cordell, were signed (R. 51-52; 304, 270-272, 173, 251, 337). Respondent claims that Velma Armstrong's card is void because she is now an office employee excluded from the appropriate unit (R. 49; 74). Actually Armstrong's signature is unimportant because even without it the Union would still have a clear majority. However, it is apparent Armstrong was assigned to candling eggs in September when she signed the card (R. 49; 19). Indeed, Manager Slayden admitted that Armstrong "candled right up until about the first of October" (R. 50; 404). Accordingly, although Armstrong may not now be within the bargaining unit, the Board was correct in counting her signature for the purposes of determining the Union's majority at the time respondent refused to bargain (R. 50-51).

affirmed 346 U. S. 482; *N. L. R. B. v. Knickerbocker Plastic Co.*, 218 F. 2d 917, 921-922.<sup>9</sup>

Respondent contends, however, that notwithstanding the Union's possession of authorization cards from 18 of the 27 employees in the bargaining unit, it did not represent an uncoerced majority, having procured the cards by threats and misrepresentations. We note in passing that had respondent really doubted that the employees actually desired the Union to represent them, respondent by refraining from its own unlawful conduct could have had the issue settled in a secret ballot election. Having foreclosed this means of determining the Union's status, respondent is hardly in a position to challenge the authorization cards, the sole remaining manner of testing the Union's claim. But in any event, as we show below, substantial evidence supports the Board's finding that the cards were not unlawfully obtained.

Respondent in its Exceptions identified five employees—Zina Jensen, Going, Godfrey, Panter, and Ellsworth—as having been fraudulently induced to sign the authorization cards (R. 75). As the trial examiner observed (R. 52), Zina Jensen's card was not included in the group of 18 relied on by the General Counsel as establishing the Union's majority. Since the Union had 18 out of 27, and since only four of the 18 are directly challenged by respondent, it follows that the Union would have a majority of 14 out of 27 even if all the challenges were well founded.

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<sup>9</sup> The unilateral change of working conditions was, of course, a further refusal to bargain. See *Fry Roofing Co. v. N. L. R. B.*, 216 F. 2d 273, 276 (C. A. 9), and cases there cited.

Analysis of the record, moreover, discloses ample evidence to support the finding of the trial examiner and the Board that the cards were lawfully obtained.

Respondent claimed that Zina Jensen was coerced into signing a card. The fact that Jensen revoked her bargaining authorization five minutes after she originally signed it of itself, refutes the contention that she felt coerced. Moreover, the record shows that Herzinger, whose testimony was expressly credited and who obtained Jensen's signature, denied coercing Jensen; and that Jensen herself denied being threatened and admitted signing the card of her "own free will" (R. 53; 329, 322, 421).

The claim that the Union secured Russell Going's membership by threatening him with a fine if he refused to join likewise fails to withstand analysis. Going testified that he signed a card when requested to do so by several female employees (R. 54; 347). He also testified that employee William Hoffman (management's source of information about the Union, p. 4, *supra*), who had not solicited his signature, said Going might be fined for failing to join, but that he (Going) "never did get the straight of it" (R. 54, 351). These facts support the finding of the trial examiner and the Board that "Going's signature was not procured by those who solicited it on the basis of a threatened fine" (R. 54).

Respondent points to some evidence that Ora Panter who joined the Union on September 22, 1953, expressed regret for that action a day later (R. 56). The record shows, however, that Panter, although advised on September 23 that she could stay in the

Union or withdraw if she so chose, did not withdraw until September 26, after the commission of the unfair labor practices described at pp. 3-7, *supra* (R. 56, 305-306, 311). Under these circumstances the Board and the trial examiner properly found that Panter's card was properly counted as part of the Union's majority (R. 56). See *N. L. R. B. v. Geigy Co.*, 211 F. 2d 553, 556 (C. A. 9), and the other cases cited *supra*, p. 12.

Equally without merit is respondent's contention that each employee was falsely told that he was the last one to be signed into the Union (R. 75). Bernard Godfrey testified "I won't say they told me, but they led me to understand that most of the employees had signed these slips" (R. 55; 378). However, in view of Godfrey's unwillingness to testify that anyone actually made such a statement to him, and the fact that Godfrey never attempted to withdraw his card, the Board found no valid basis for refusing to count his card (R. 55-56; 378, 381). The only other testimony having any possible relevance to the above contention of petitioner is that of Russell Going who testified that at the time he signed he was told that the "biggest percentage" of his fellow employees "either had signed it or \* \* \* they *would* sign it" (emphasis added) (R. 54; 347). But respondent's concession (R. 75) that a majority did eventually sign disposes of any argument that this was a false statement.

Finally respondent contended that the employees were told that their signatures were merely being obtained for the purpose of having an election and that they were not authorizing the Union to bargain

for them (R. 75). In support of this respondent directed the Board's attention to the testimony of Gene Ellsworth that he understood the membership card "was for the employees to have a meeting with the Union to discuss the benefits, if any, with the union" (R. 57; 355). As the trial examiner observed, this is not "inconsistent with the purposes of union representation and \* \* \* Ellsworth, who is not illiterate, intended to do precisely what the card indicated on its face, namely, designate the union as bargaining representative" (R. 57). Respondent relies on the testimony of Janet Stoddard, who stated: "Well, I heard it two different ways. I heard it once that when the majority signed those slips we was automatically in the union and then another time I heard that it had to go to a vote" (R. 259-260). This is entirely consistent, however, with Union Representative Lott's explanation that if respondent acknowledged the Union's majority, bargaining would commence at once, but if respondent refused, the Union would have to file for an election and forward the authorization cards to the Board (*supra*, p. 3). Or, as Carrie Monroe testified, "the way I understood it" by signing "we was almost the same as in the Union" (R. 270).

In sum, absent any specific showing that false or coercive statements were made by the Union, the Board had justification for concluding, as did the court in *Continental Oil Co. v. N. L. R. B.*, 113 F. 2d 473, 480 (C. A. 10), that "since the instrument indicates clearly a purpose to designate the union as the representative of the employees for the purposes of collec-



tive bargaining," the employees actually intended it to have that effect (R. 57).<sup>10</sup>

#### CONCLUSION

For the reasons stated, it is respectfully submitted that the Board's findings are supported by substantial evidence on the record considered as a whole, that the Board's order is valid and proper, and that a decree should issue enforcing the order in full.<sup>11</sup>

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SEPTEMBER 1955.

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<sup>10</sup> The language of the union authorization cards is substantially the same as in *N. L. R. B. v. Geigy Co.*, 211 F. 2d 553, 556 (C. A. 9), where an identical contention was made. Each card contained the statement "The undersigned hereby designates International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, Local No. 983 as his bargaining agent for the purpose of collective bargaining regarding wages, union shops, and conditions of employment" (R. 16-17).

<sup>11</sup> It is immaterial that the Union in fact lost its majority after respondent's unlawful campaign. That loss of majority is properly attributable to respondent's unfair labor practices, and the order to bargain is thus an appropriate remedy for the unfair labor practices. *N. L. R. B. v. Geigy Co.*, 211 F. 2d 553, 557-558 (C. A. 9) and cases there cited. Likewise of no consequence is the fact that on April 5, 1955, respondent filed a petition, not a part of this record, to have the Board conduct an election among its employees. This petition, of course, was properly dismissed pursuant to the settled Board policy of not entertaining representation petitions during the pendency of unremedied unfair labor practices. *N. L. R. B. v. Trimfit*, 211 F. 2d 206, 209, n. 2 (C. A. 9); *N. L. R. B. v. Hamilton*, 220 F. 2d 492, 495 (C. A. 10).



## APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, Secs. 151, *et seq.*), are as follows:

### RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

### UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

SEC. 10. \* \* \*

(c) \* \* \* If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring

such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: \* \* \*

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. \* \* \*

No. 14701

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**United States  
Court of Appeals  
for the Ninth Circuit**

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KIMBERLY CORPORATION, a Corporation,  
Appellant,

vs.

HARTLEY PEN COMPANY, a Corporation  
LINDY PEN CO., INC., a Corporation, and  
SIDNEY LINDEN, Individually and Doing  
Business as Adams-Linden Co.,  
Appellees.

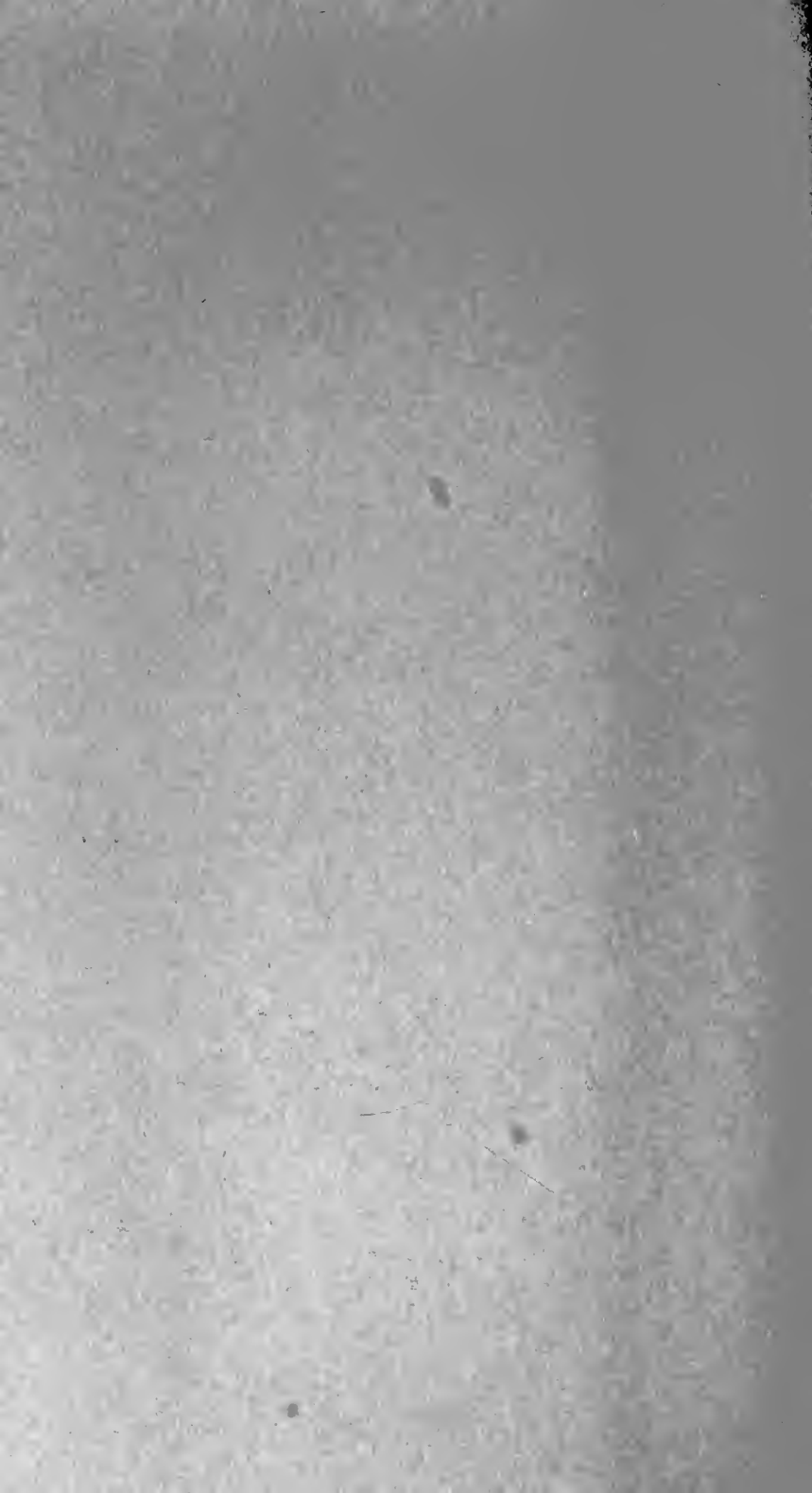
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**Supplemental  
Transcript of Record**

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**Appeal from the United States District Court for the  
Southern District of California,  
Central Division**

**FILE**



No. 14701

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United States  
Court of Appeals  
for the Ninth Circuit

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KIMBERLY CORPORATION, a Corporation,  
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Los Angeles 14, California.



In the United States District Court, Southern  
District of California, Central Division

Civil Action No. 15367-WM

HARTLEY PEN COMPANY, a California Corporation,

Plaintiff,

vs.

LINDY PEN CO., INC., a California Corporation;  
SIDNEY LINDEN, Individually and Doing  
Business as ADAMS-LINDEN CO., and  
JOHN DOE,

Defendants.

KIMBERLY CORPORATION, a California Corporation,

Intervener-Plaintiff, Cross-claimant and Counter-claimant,

vs.

HARTLEY PEN COMPANY, a California Corporation,

Cross-defendant,

LINDY PEN CO., INC., a California Corporation,  
and SIDNEY LINDEN, Individually and Doing  
Business as ADAMS-LINDEN CO.,

Counter-defendants.

SUPPLEMENTAL FINDINGS OF FACT, CON-  
CLUSIONS OF LAW, AND JUDGMENT

Whereas, on December 22, 1954, Judgment Dis-  
missing Intervener's First Amended Complaint was

entered in this action, and on February 3, 1955, a Notice of Appeal therefrom was filed by intervener Kimberly Corporation; and

Whereas, on February 20, 1956, a mandate was issued by the Court of Appeals for the Ninth Circuit ordering and adjudging that said appeal be dismissed; and

This cause having come on for further proceedings before this Court, and after a hearing duly had and reconsideration of the record in this action and the attached Stipulation of the parties hereto, the following supplemental findings of fact and conclusions of law are hereby adopted by the Court:

#### Supplemental Finding of Fact

#### XXIII.

There is no just reason for delay in entering the following final judgment as to intervener Kimberly Corporation.

#### Supplemental Conclusions of Law

#### VII.

There is no just reason for delay in entering the following final judgment, and the entry of such judgment is hereby expressly directed:

#### Final Judgment

In accordance with the findings of fact and conclusions of law entered on December 22, 1954, by this Court in the above-entitled action and the fore-

going supplemental findings of fact and conclusions of law, and it having been determined that there is no just reason for delay and there being an express direction by this Court for the entry of judgment, it is ordered, adjudged, and decreed: [3\*]

I.

Each and every one of the claims of the intervener, Kimberly Corporation, against the plaintiff, Hartley Pen Company, as set forth in the Intervener's First Amended Complaint, is denied because of laches.

II.

The Intervener's First Amended Complaint is hereby dismissed with prejudice, and without leave to amend.

III.

The plaintiff, Hartley Pen Company, shall recover from the intervener, Kimberly Corporation, its costs and disbursements herein in the amount of \$59.10.

Dated: March 27, 1956.

/s/ WM. C. MATHES, JR.,

United States District Judge.

Approved as to Form:

FLAM & FLAM,

By /s/ JOHN FLAM,

Attorneys for Intervener,  
Kimberly Corporation.

HARRIS, KIECH, FOSTER &  
HARRIS,

By /s/ FORD HARRIS, JR.,  
Attorneys for Plaintiff,  
Hartley Pen Company.

/s/ DONALD A. ROSEN,  
Attorney for Defendants, Lindy Pen Co., Inc., and  
Sidney Linden, Individually and d/b/a Adams-  
Linden Co. [4]

[Title of District Court and Cause.]

### STIPULATION

It is hereby stipulated by and between the parties to the above-entitled action through their respective attorneys that the foregoing Supplemental Findings of Fact, Conclusions of Law, and Judgment may be made and entered by the Court, and that such Judgment may be decreed to be final, subject to the right of appeal therefrom to be preserved to each of the parties hereto as from any final judgment.

It is further stipulated that the record on appeal now before the Court of Appeals for the Ninth Circuit in Appeal No. 14,701, and the briefs of the parties on file in connection therewith, together with any supplemental transcript of appeal which may be filed in connection with said action, shall constitute the record on appeal in any new appeal



prosecuted by any of the parties to this action from the foregoing Judgment.

Dated: March 27, 1956.

HARRIS, KIECH, FOSTER &  
HARRIS,

By /s/ FORD HARRIS, JR.,  
Attorneys for Plaintiff,  
Hartley Pen Company;

FLAM & FLAM,

By /s/ JOHN FLAM,  
Attorneys for Intervener,  
Kimberly Corporation.

/s/ DONALD A. ROSEN,  
Attorney for Defendants, Lindy Pen Co., Inc., and  
Sidney Linden, Individually and d/b/a Adams-  
Linden Co.

[Endorsed]: Filed March 27, 1956.

Docketed and entered March 28, 1956. [6]

---

[Title of District Court and Cause.]

NOTICE OF APPEAL UNDER  
RULE 73(b) F.R.C.P.

Notice is hereby given that Kimberly Corpora-  
tion, intervener [7] above named, hereby appeals  
to the United States Court of Appeals for the Ninth  
Circuit from the judgment entered in this action  
on March 27, 1956.

Dated: March 29, 1956.

Respectfully submitted,

FLAM and FLAM,

By /s/ JOHN FLAM,

Attorneys for Intervener.

EUGENE H. MARCUS, ESQ.,  
Of Counsel.

[Endorsed]: Filed April 2, 1956. [8]

---

[Title of District Court and Cause.]

STIPULATION UNDER RULE 75(f) F.R.C.P.

It Is. Hereby Stipulated by and between the parties to the above-entitled action, through their respective counsel, that the following shall constitute the record on appeal:

1. Printed transcript of record in Kimberly Corporation, a corporation, appellant, vs. Hartley Pen Company, a corporation; Lindy Pen Co., Inc., a corporation, and Sidney Linden, individually and doing business as Adams-Linden Co., appellees, Appeal No. 14701 in the United States Court of Appeals for the Ninth Circuit.

2. Stipulation executed by and between the parties herein on March 27, 1956, filed on March 27, 1956.

3. Supplemental Findings of Fact, Conclusions of Law and Judgment, filed March 27, 1956.

4. Notice of Appeal, filed April 2, 1956.

5. This stipulation.

Since the said printed transcript (item No. 1) above is already on file in the Court of Appeals for

the Ninth District, It Is Stipulated that the Clerk of this Court transmit to the Appellate Court only the material designated as items 2 to 5, inclusive, hereinabove defined. That printed transcript includes all material required by the rules of this court and the Court of Appeals for the Ninth Circuit relating to the hearing of the appeal, including the pleadings, original findings and judgment, testimony of witnesses, exhibits and concise statement of points upon which appellant will rely; and by stipulation to be filed in the appellate court, such transcript is to be adopted as a part of the transcript in this appeal.

Dated: April 2, 1956.

HARRIS, KIECH, FOSTER &  
HARRIS,

By /s/ FORD HARRIS, JR.,

Attorneys for Hartley Pen  
Company. [10]

FLAM and FLAM, and  
EUGENE H. MARCUS,

By /s/ JOHN FLAM,

Attorneys for Kimberly Cor-  
poration.

/s/ DONALD A. ROSEN,

Attorney for Defendants, Lindy Pen Co., Inc., and  
Sidney Linden, Individually and d/b/a Adams-  
Linden Co.

[Endorsed]: Filed April 30, 1956. [11]

[Title of District Court and Cause.]

### CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 11, inclusive, contain the original:

Supplemental Findings of Fact, Conclusions of Law, and Judgment;

Notice of Appeal;

Stipulation re Designation of Contents of Record on Appeal;

all in the above-entitled cause, and constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above case.

I further certify that my fees for preparing the foregoing record amount to \$2.00, which sum has been paid by appellant.

Witness my hand and seal of the said District Court this 1st day of May, 1956.

JOHN A. CHILDRESS,  
Clerk;

By /s/ CHARLES E. JONES,  
Deputy.

[Endorsed]: No. 14701. United States Court of Appeals for the Ninth Circuit. Kimberly Corporation, a Corporation, Appellant, vs, Hartley Pen Company, a Corporation; Lindy Pen Co., Inc., a Corporation; and Sidney Linden, Individually and Doing Business as Adams-Linden Co., Appellees. Supplemental Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed May 2, 1956.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for the  
Ninth Circuit.



No. 14701.

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

KIMBERLY CORPORATION, a corporation,

*Appellant,*

*vs.*

HARTLEY PEN COMPANY, a corporation, LINDY PEN Co.,  
INC., a corporation, and SIDNEY LINDEN, individually  
and doing business as Adams-Linden Co.,

*Appellees.*

---

Opening Brief for Intervener-Appellant, Kimberly  
Corporation.

---

FLAM & FLAM,

BY JOHN FLAM,

2978 Wilshire Boulevard,  
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*Attorneys for Intervener-Appellant.*

EUGENE H. MARCUS,

608 South Hill Street,  
Los Angeles 14, California,

*Of Counsel.*

FILED

JUL 14 1955

PAUL P. O'BRIEN, CLERK





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No. 14701.  
IN THE  
**United States Court of Appeals**  
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KIMBERLY CORPORATION, a corporation,

*Appellant,*

*vs.*

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INC., a corporation, and SIDNEY LINDEN, individually  
and doing business as Adams-Linden Co.,

*Appellees.*

---

Opening Brief for Intervener-Appellant, Kimberly  
Corporation.

---

**Jurisdictional Statement.**

Intervener-appellant filed an amended complaint [R. 16-27, incl.],\* alleging that patent 2,498,009 (the subject-matter of the action by Hartley Pen Company, plaintiff-appellee, for infringement against Lindy Pen Co., Inc., *et al.*, defendants) rightfully belonged to the appellant [R. 23, par. 19].

---

\*Abbreviations "R" followed by numbers will hereinafter designate the transcript of record and the page numbers.

Federal jurisdiction is thus based broadly upon the proposition that intervener's claims are ancillary to the main action, which action is properly before the Court, and therefore no further basis for Federal jurisdiction is required [Finding VI, R. 43, 44].

### Statement of the Case.

This is an appeal from a judgment dismissing intervener-appellant's first amended complaint on the ground that intervener-appellant's claim was barred by laches [R. 56].

An action was originally commenced by Hartley Pen Company, the original plaintiff herein, against Lindy Pen Co., Inc., *et al.*, claiming infringement of the patent here in suit [Finding III, R. 41, 42].

Appellant claiming to be equitably entitled to the patent in suit, upon application therefor was permitted to intervene in the action. To appellant's first amended complaint in intervention, plaintiff-appellee interposed, among other defenses, the affirmative defense of laches [R. 38, par. XXXVI]. The trial court ordered a separate trial upon the issues raised by said affirmative defense [R. 40; Finding IX, R. 45].

Intervener-appellant's first amended complaint [R. 16 *et seq.*], briefly summarized, alleges as follows: that since prior to 1945, it was engaged in the manufacture of ball point pens [R. 18]; that one Hartley M. Sears from some time in 1945 to May, 1947, was employed by it in the capacity of Chief Engineer and Technical Director in connection with the manufacture of its pens [R. 19, 20,

21]; that one Clarence O. Schrader was also employed by it from some time in 1945 to May, 1947, in the capacity of General Foreman and assistant to said Sears [R. 19, 20, 21]; that by reason of the nature of their employment, said Sears and Schrader were obligated to assign all patent rights in any improvement made by them in connection with ball point pens and parts thereof to intervener-appellant [R. 19]; that by reason of the nature of the employment of said Sears and Schrader and the relationship of the parties, intervener-appellant reposed full trust and confidence in said Sears and Schrader [R. 20].

Said complaint further alleges that in the course of their duties as such employees of intervener-appellant, said Sears and Schrader jointly invented the apparatus and method which is the subject-matter of the patent in suit [R. 20]; that on or about May 1, 1947, Sears left the employ of intervener-appellant [R. 20, 21]; that shortly prior to his leaving said employment, Sears was asked by intervener-appellant whether all necessary steps had been taken for obtaining patent protection on everything conceived or developed for intervener-appellant generally and the invention embodied in the patent in suit in particular [R. 21]; that in answer to said inquiry and in violation of the trust and confidence reposed in him, Sears falsely represented to intervener-appellant that the machine protected by the patent in suit did not include any patentable features; that in truth and in fact said Sears, in collaboration with Schrader, and while both were still employed by intervener-appellant, had already taken steps for the filing of a patent application based

upon the machine and the method which resulted in the patent in suit [R. 21].

Intervener-appellant's complaint further alleges that relying on the fraudulent representations of said Sears, it made no further inquiry regarding the patenting of said machine and did not learn of the issuance of said patent until the early part of December, 1953 [R. 21, 22]; and that Sears and Schrader had concealed from intervenor-appellant both the fact that they had applied for a patent on said machine and that said patent had issued [R. 22].

Intervener-appellant's complaint further alleges that Hartley Pen Company, plaintiff-appellee, is not a bona fide assignee for value of the application that resulted in the issuance of said patent, for the reason that Sears and Schrader were among its original incorporators, that Sears was a major stockholder, director and President thereof, and that both Sears and Schrader had been in active charge of its business affairs; and that therefore at the times pertinent herein, plaintiff-appellee had knowledge of the prior paramount rights of intervenor-appellant at and prior to the time that the assignment of said application for Letters Patent was made to it [R. 23].

So far as pertinent to this appeal, the complaint prays for a judgment ordering that Hartley Pen Company, plaintiff-appellee, execute an assignment of said patent to intervenor-appellant, for an injunction, an accounting and other appropriate relief [R. 25].

On October 26, 1954 a separate trial was had on the issues raised by the affirmative defense of the bar of



laches.\* By stipulation, certain affidavits on file in the proceeding were accepted as the first testimony of the respective parties offering same [Finding IX, R. 45].

The trial court found that intervenor-appellant had both actual and constructive notice of facts which should have caused it to assert its claim at an earlier time. The substance of said findings may be summarized as follows:

(1) That one Casimir A. Miketta, a patent lawyer, acting as agent for intervenor-appellant knew of the refusal of Sears and Schrader to assign inventions made in the course of their employment with intervenor-appellant [Finding XV, R. 49, 50].

(2) That an assignment of the application resulting in the patent to Hartley Pen Company, appellee herein, was recorded in the Patent Office on November 12, 1949 [Finding XVIII, R. 52, 53].

(3) That the patent in suit was issued on February 21, 1950 [Finding XVIII, R. 53].

---

\*In an equity case involving fraud, by analogy to actions at law, the time pertinent to the defense of laches may be reasonably assumed to begin with discovery of the fraud.

The pertinent California statute Section 338, subdivision 4 of the Code of Civil Procedure states that:

“Within three years.

“\* \* \*

“4. An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.”

This section has been interpreted by the California courts to the effect that “discovery” of a fraud can be referred to a time when a reasonably prudent man would make inquiry, or when it was the duty to make such inquiry.

(4) That Sears told Croan, an employee of appellant, prior to the middle of 1950, of the issuance and content of the patent in suit [Finding XIX, R. 53, Footnote 19].

(5) That Mr. Miketta informed intervener-appellant of the refusal of Sears and Schrader, prior to June 5, 1947, to agree to assign to it inventions made in the course of their employment by said intervener-appellant [Findings XV, XVI, R. 49, 50, 51, 52].

(6) That Croan, while in the employ of intervener-appellant, prior to the middle of 1950, had one or more discussions with Mr. Zyga Taube, an officer of intervener-appellant, about the patent in suit and that therefore intervener-appellant knew of the issuance of the patent in suit [Finding XIX, R. 53 which refers in Footnote 19 to the testimony of Croan].

(7) That intervener-appellant was negligent in failing to take steps to ascertain whether the machine was patentable [Finding XIV, R. 48].

No evidence whatever was adduced by plaintiff-appellee on the issue as to whether it had in any way been prejudiced by the purported delay in the assertion of intervener's claim and no finding was made on that issue.

The Court ordered [R. 40] that plaintiff lodge findings, and the Findings of Fact were accordingly prepared by counsel for plaintiff-appellee. These were adopted by the Court as presented.

The evidence adduced at the trial established without dispute that Mr. Miketta, a patent attorney, represented both intervener-appellant on the one hand and Sears and Schrader on the other hand during the critical periods

involved in this controversy. This fact was unknown to intervener-appellant. It was the contention of intervener-appellant therefore that as a matter of law, Mr. Miketta could not have been a conduit for constructive notice to said intervener-appellant. A motion was made under Rule 52(b) F. R. C. P. to amend the Findings in order to reflect these facts [R. 59, 60]. This motion was denied [R. 67].

Intervener-appellant's position is as follows:

(1) That it had neither actual nor constructive notice of the alleged fraud perpetrated upon it by Sears and Schrader, or of any facts sufficient to put it on inquiry, until early December, 1953.

(2) That Casimir A. Miketta, its patent counsel, was, as a matter of law, not a conduit for constructive notice of any of the facts relating to said fraud, for the reason that he was at that time representing adverse interests—both intervener-appellant, and Sears and Schrader.

(3) That intervener-appellant was never actually informed by anyone that Sears and Schrader were refusing to assign patent rights based upon an alleged claim on their part that they were not obligated to do so; and that such testimony as was given on this subject by witnesses for plaintiff-appellee is confused, contradictory, and so uncertain as to be without probative value.

(4) That neither the recording of the assignment of the application for Letters Patent nor the issuance of the patent itself constituted constructive notice to intervener-appellant so as to give rise to a duty to investigate, since the confidential relationship existing between it and

Sears and Schrader relieved intervenor-appellant from any duty to search the public records to determine the pendency or issuance of the patent in suit.

(5) That the purported conversation in 1950 between Sears and Croan relating to the patent in suit was not constructive notice for any purpose to intervenor-appellant since it was not shown that Croan was a "representative" of intervenor-appellant, or that he occupied a legal relationship with respect to intervenor-appellant which would constitute him a legal conduit for constructive notice.

The questions therefore to be determined on this appeal are as follows:

(a) Did intervenor-appellant have such timely constructive or actual notice of facts relating to the alleged fraud as to form a basis for the defense of laches interposed by plaintiff-appellee?

(b) Was there any showing on the part of plaintiff-appellee of prejudice or damage to it as a result of the purported delay in the assertion by intervenor-appellant of its said claim?

(c) Whether or not upon a consideration of the entire evidence in this case a mistake has been committed, and whether or not the Findings in this case and the Judgment based thereon are clearly erroneous.

## Specification of Errors Relied Upon.

1. Mr. C. A. Miketta, as patent attorney and unknown to appellant, represented adverse interests as between Sears and Schrader, on the one hand, and intervenor-appellant, on the other hand, during the occurrences that are significant in this action. The law is settled that under the circumstances, Mr. Miketta could not be deemed to be a source of constructive notice to appellant of the alleged fraud. This all-important matter, overshadowing this litigation, was not mentioned in either the Findings of Fact or Conclusions of Law, although appellant requested such findings [R. 57 *et seq*]. *As a matter of law*, therefore, the trial court erred in finding that Mr. Miketta's knowledge of facts involved in this controversy was notice to his client, the intervenor-appellant.

2. The trial court erred in imputing constructive notice to intervenor-appellant of the issuance of the patent in suit by virtue of the asserted conversation between Sears and Croan (an employee of intervenor-appellant) in 1950 [R. 98] because it was not shown that Croan was a "representative" or agent of intervenor-appellant.

3. The trial court erred in imputing constructive notice to intervenor-appellant of the pendency of the application because of the recording of the assignment thereof on November 12, 1949, because the intervenor-appellant was under no duty to search the public records.

4. The trial court erred in imputing constructive notice to intervenor-appellant of the issuance of the patent on February 21, 1950, because intervenor-appellant was under no duty to search the public records.

5. The finding by the trial court to the effect that intervenor's executive Vice-President, Zyga Taube, knew of the issuance of the patent in suit in 1950 based upon the equivocal, unsatisfactory, and incredible testimony of Croan, is clearly erroneous.

6. The finding by the trial court to the effect that intervenor-appellant had actual knowledge in May, 1947 of the refusal of Sears and Schrader to make a general assignment of their inventions to intervenor-appellant, is clearly erroneous because the testimony of Miketta on this matter is so equivocal, confused and unsatisfactory as to constitute the record virtually without support for such a finding.

7. The trial court erred in finding [R. 48, 51, 52] that intervenor was negligent or lacking in prudence in failing to make investigations regarding the perpetration of the fraud. It is undisputed that Sears and Schrader, who are accused of fraudulent acts, were in a position of trust and confidence with respect to intervenor-appellant. Under the circumstances, intervenor-appellant was excused from making such investigation on this subject. Although the trial court was requested to do so [R. 58], the Court failed to make any finding at all on this matter of trust and confidence.

8. The trial court erred in failing to recognize that a mere lapse of time between May, 1947 and January, 1954 alone is not sufficient to sustain the defense of laches; and in failing to find that Hartley Pen Company, appellee herein, did not sustain its burden of proof of prejudice and injury occasioned by the delay.

### Summary of Argument.

It is the contention of intervener-appellant that it had neither actual nor constructive notice of the alleged fraud perpetrated by Sears and Schrader until early December of 1953. Mr. Miketta, its patent counsel, was as a matter of law not a conduit for constructive notice of any of the crucial facts which would have disclosed the fraud back in May and June of 1947, and thereafter, for the reason that he was at all of said times representing both intervener-appellant on the one hand, and Sears, Schrader and plaintiff-appellee on the other hand, in an area in which there was a definite conflict of interests. Mr. Miketta admitted that he did not inform intervener-appellant of this dual representation and that once having undertaken to represent Sears on the swedging machine patent he could not and would not reveal any of Sears' business to intervener-appellant.

The record is clear that Mr. Sears was chief engineer in charge of the designing and production of the very machines which produced intervener-appellant's products. He not only knew but was in many instances the very source of crucially confidential information vital to his employer's business. Of necessity, therefore, intervener-appellant was compelled to and did in fact repose complete trust and confidence in him. Under the circumstances and in view of the confidential relationship there was no duty on the part of intervener-appellant to search the public records for the purpose of anticipating a fraud perpetrated by its own trusted employee.

The testimony relating to the purported conversations and other direct communications between Mr. Miketta and

Mr. Croan, on the one hand, and representatives of intervener-appellant on the other hand, alleged by plaintiff-appellee to establish the fact that intervener-appellant had actual notice of the fraud or facts from which it should have discovered the same, is not only refuted by documentary evidence, but is so confused, uncertain and in parts so inherently incredible as to be without probative value. Moreover, plaintiff-appellee neither alleged nor proved that it was in any way prejudiced by the time lapse between its acquisition of the application resulting in the patent, and the assertion of intervener-appellant's claim.

This Honorable Court on the record made in this case is in as good a position as the trial court to appraise the evidence. Such an appraisal of the entire evidence made under Rule 52 (a) (Federal Rules of Civil Procedure) will, we believe, disclose that a mistake has been committed by the trial court; and that the evidence does not support the Findings and the Judgment thereon.



## ARGUMENT.

### I.

**The Findings That Intervener-Appellant Had Timely Constructive Notice of the Alleged Fraud Are Not Supported by the Evidence.**

1. **Mr. Miketta, Patent Counsel for Intervener-Appellant, Was Not and Could Not Have Been a Conduit for Constructive Notice.**

The initial and principal conduit for the possible transmission of constructive notice to intervener-appellant was Mr. Casimir A. Miketta, patent counsel for intervener-appellant, who handled the negotiations with Sears and Schrader relative to the matter of assigning patent rights to intervener-appellant [Finding XV, R. 49, 50]. Mr. Miketta's dual role in representing both the intervener-appellant on the one hand and Sears and Schrader on the other hand during the critical periods involved in this controversy renders any knowledge that Mr. Miketta himself had about these critical transactions ineffective to constitute constructive notice to intervener-appellant. In May of 1947, Mr. Miketta represented Sears in applying for a patent on an invention relating to ball point pens on behalf of Hartley Pen Company, plaintiff-appellee herein [Intervener's Ex. A-1; R. 225, 226].

According to Mr. Miketta's own testimony, it was not until June 2, 1947 that he approached Sears and Schrader on behalf of intervener-appellant for the purpose of requesting that they make a general assignment of inventions and patent rights to intervener-appellant and to its prospective successor, Eversharp, Inc. [R. 200, 241].

It is a well-established rule of law that where an agent or attorney represents adverse interests, knowledge of the agent or attorney obtained in the course of his dealings with the adverse party is not constructive notice to the principal. This rule is supported by numerous cases.

In considering constructive notice by virtue of the attorney-client relationship, the same rules apply as in ordinary agency (*Atkinson v. Foote, et al.*, 44 Cal. App. 149, 165, 186 Pac. 831, 838). Accordingly, decisions involving the principal-agent relationship are pertinent in this connection.

Mr. Miketta having undertaken representation of parties having conflicting interests, the intervener-appellant cannot be presumed to have knowledge of what was going on insofar as Mr. Miketta was concerned. Moreover, in determining whether an agent acting for two parties with conflicting interests is a conduit of constructive notice, it is wholly immaterial that the motives and intention of the agent are honest.

In *Mott v. Nardo*, 73 Cal. App. 2d 159, 165, 166 P. 2d 37, 41, the court at page 165, states:

“ . . . It is the invariable rule that knowledge of the acts of an agent which are in his own interest or in the interest of others and adverse to those of his principal will not be imputed to the principal because of the mere existence of the agency.”

See also *Burns v. McCain, et al.*, 107 Cal. App. 291, 295, 290 Pac. 623, 625.

In *Mutual Life Insurance Company of New York v. L. Hilton-Green, et al.*, 241 U. S. 613, 60 L. Ed. 1202, the court says, at page 622:

“The general rule which imputes an agent’s knowledge to the principal is well established. The underlying reason for it is that an innocent third party may properly presume the agent will perform his duty and report all facts which affect the principal’s interest. But this general rule does not apply when the third party knows there is no foundation for the ordinary presumption,—when he is acquainted with circumstances plainly indicating that the agent will not advise his principal. *The rule is intended to protect those who exercise good faith, and not as a shield for unfair dealing.*” (Italics ours.)

Cases in other jurisdictions consistent with the above are as follows: *Interstate Nat. Bank of Kansas City, Mo. v. Yates Center Nat. Bank of Yates, Kan., et al.*, 245 Fed. 294, 295 (C. C. A. 8); *Skud v. Tillinghast*, 195 Fed. 1, 5 (C. C. A. 6).

The all-important fact of adverse representation is not even hinted at in the Findings or in the Conclusions of Law. We must remember that these findings and conclusions were prepared by Order of the Judge by the attorneys for the plaintiff-appellee [R. 40]. These findings avoid any mention of this dual representation, which dual representation is made amply clear in the record [Affidavit of Miketta, Pltf. Ex. 4, R. 203; Affidavit of Miketta, Pltf. Ex. 4-A, R. 212; Testimony of Miketta, R. 234, 235, 244, 245, 246; Testimony of Sears, R. 99; Intervener’s Exs. A-1, R. 225; A-2, R. 226; A-3, R. 226; A-4, R. 228; A-5, R. 229, 230, 231].

This failure to make a finding regarding Mr. Miketta's dual role is in itself a grave error. The importance of the trial court's duty to make full and accurate findings is forcibly discussed in *United States v. Forness, et al.*, 125 F. 2d 928, 942 (C. C. A. 2).

That Mr. Miketta could not be expected to disclose the facts relating to the filing by Sears and Schrader of the application for the patent on the invention embodied in the patent in suit or any other matter affecting Sears' and Schrader's activities is quite clear, both from his testimony at the trial as well as his testimony given on September 20, 1954, the transcript of which is in evidence as Intervener's Exhibit B [R. 233 *et seq.*].

In this connection, Mr. Miketta testified as follows [R. 235]:

"Question by the Court: At any time between the date of filing of the application and the issuance of the patent, did you ever communicate with anyone in any way connected with Kimberly Corporation about the pendency of that application?

The Witness: No, Your Honor, while it was pending I did not disclose it or talk about it to Kimberly Corporation, because, well, that is a matter that belonged to Sears and Schrader."

Mr. Miketta also testified that he did not discuss one client's business with another client [R. 110, 111]:

"Q. When did you first learn that that swedging machine was developed in the plant of the Kimberly Corporation? A. The first that I knew of that subject matter was somewhere between June 6th, or June 5th, and June 10th of 1947.

Q. And did Mr. Sears tell you that? A. Yes.

Q. What did he tell you about that development in the Kimberly plant? A. Well, he stated that they had developed—by ‘they’ I mean Mr. Schrader and Mr. Sears—had developed a machine in a method of holding the little balls in the tip of a ball point pen; and that they had used that over at the Kimberly Corporation; and felt they wanted to get a patent on it.

Q. Did you ever inform Kimberly that you learned that this swedging machine was actually used and had been developed in the Kimberly plant, as soon as you learned it? A. No, I didn’t tell Kimberly that. Mr. Sears was not with Kimberly Corporation at that time, and we had gone through, during the preceding months with all those discussions between Kimberly and Sears and Eversharp counsel.

Q. So you didn’t tell Kimberly that you had learned about this machine being developed in the plant? A. I don’t discuss one client’s business with another.

The Court: Your answer is no?

The Witness: ‘No,’ your Honor.”

It is also important to note that Mr. Miketta represented Mr. Sears at least as early as March 11, 1947, approximately two months before the Kimberly-Eversharp transaction commenced, for on that date Mr. Miketta filed an application for Letters Patent covering an invention made by Sears and one Pflueger [Intervener’s Ex. B; R. 244, 245].

Furthermore, Mr. Miketta when he testified on September 20, 1954, was positive that he had never represented Sears *on any matter* before June 9th or June 10th

of 1947 [R. 244]. He later admitted in his affidavit filed on October 25, 1954 [Pltf. Ex. 4-A; R. 212] that he was in error and that he had represented Sears on a patent matter in the middle of May, 1947, and had actually filed a patent application for Sears and one Boorman on May 22, 1947. This testimony is further corroborated by Intervener's Exhibits A-1, A-2 and A-3 [R. 225 to 228].

Mr. Miketta also further testified that he did not inform intervenor-appellant that he had taken on the representation of Sears and this is corroborated by Sears' testimony [R. 99, 116].

**2. The Recording of the Assignment of the Application for the Patent in Suit on November 12, 1949, and the Issuance of Said Patent on February 21, 1950 Did Not Constitute Constructive Notice to Intervener-Appellant Under the Law Applicable to This Case.**

It is clear from the evidence that Sears and Schrader were employed by intervenor-appellant in technical capacities involving knowledge of manufacturing processes and machinery in the plant of the intervenor-appellant. Accordingly intervenor-appellant was entirely justified in reposing full trust and confidence in them. That Mr. Sears was in such a confidential relationship to intervenor-appellant is also quite forcibly established by Plaintiff's Exhibit E attached to Exhibit 1-B [R. 190]. This Exhibit is a letter of recommendation dated May 1, 1947, signed by Mr. Taube, Executive Vice-President of intervenor-appellant and accepted by Mr. Sears in which Sears' ability, moral standing, experience and technical knowledge are glowingly asserted. Moreover, Mr. Sears delineated

the true nature and scope of his employment when he testified as follows:

“At the time of my employment I was employed as a tool maker to produce, build machines to turn out pens which I had previously designed.” [R. 100.]

He testified [R. 100] that his salary was a thousand dollars a month [see also Affidavit of Taube, R. 253].

There is no duty on the part of a defrauded party, particularly where the fraud is perpetrated by a person standing in a position of confidence and trust with respect to the defrauded party, to anticipate the fraud by searching the public records which might give notice thereof.

In *Anderson v. Thacher*, 76 Cal. App. 2d 50, 63, 69, 70, 71, 172 P. 2d 533, 540, 544, 545, at page 69, the court says:

“ . . . The evidence in the case at bar clearly establishes a confidential relation between plaintiff and defendant Thacher, and that the latter abused the confidence placed in him. When the misrepresentations are intentional rather than negligent plaintiff’s negligence in failing to discover the falsity thereof is no defense. *Seeger v. Odell*, 18 Cal. 2d 409, 414, 115 P. 2d 977, 136 A. L. R. 1291. The same case is authority for the statement that the fact that an investigation would have revealed the falsity of the misrepresentations will not always bar recovery. *Defendant Thacher’s claim that plaintiff is also charged with knowledge of the contents of the public records of Los Angeles County, which showed the true ownership of the Hollywood Boulevard property (Civ. Code, sec. 1213) is answered by the Supreme Court in Seeger v. Odell, supra, 18 Cal. 2d at page 415, 115 P. 2d at page 980, 136 A. L. R. 1291, wherein it is said: ‘\* \* \* and it is well established that he is*

*not held to constructive notice of a public record which would reveal the true facts.* Rest. Torts, sec. 540(b); see cases cited in 12 Cal. Jur. 759, 764; Prosser, Torts, 750, 751. *The purpose of the recording acts is to afford protection, not to those who make fraudulent misrepresentations, but to bona fide purchasers for value.'* Under the facts of the instant case it cannot be said that plaintiff's conduct in the light of her own intelligence and information was manifestly unreasonable. Therefore, she will not be denied recovery. Defendant Thacher cannot be heard to complain that plaintiff reposed too much confidence in him. 'No rogue should enjoy his ill-gotten plunder for the simple reason that his victim is by chance a fool.' Seeger v. Odell, *supra*, 18 Cal. 2d at page 415, 115 P. 2d at page 981, 136 A. L. R. 1291. The law does not applaud fraud and condemn the victim thereof for his credulity. Peculiarly pertinent to the case at bar is the following language used by the Supreme Court in Victor Oil Co. v. Drum, 184 Cal. 226, 241, 193 P. 243, 249:

" 'The courts will not lightly seize upon some small circumstance to deny relief to a party plainly shown to have been actually defrauded against those who defrauded him on the ground, forsooth, that he did not discover the fact, that he had been cheated as soon as he might have done. It is only where the party defrauded should plainly have discovered the fraud except for his own inexcusable inattention that he will be charged with a discovery in advance of actual knowledge on his part.' " (Italics ours.)

In *Dabney v. Philleo et al.*, 38 Cal. 2d 60, 66, 237 P. 2d 648, 652, the Supreme Court of the State of California, at page 66, states:

" . . . These facts do not, as a matter of law, show that a reasonable person, in the circumstances



alleged by plaintiffs, who was interested in the estate as an heir should have read the inventory and appraisal and discovered that he had an interest adverse to the estate in properties claimed by it. The mere passage of time and the deaths of his uncle and aunt and the scheduling of the assets claimed by the estate were not circumstances which would necessarily have caused a reasonable man, who 19 years previously had accepted the misrepresentations of the trusted uncle and who had continued to believe in him implicitly, to probe into the administration of the estate of the trusted aunt in an investigation of the truth of the particular misrepresentations which are alleged to have been made.

“Since we cannot as a matter of law reject plaintiffs’ explanation of their delay in discovering the facts, we conclude that on the face of their pleading their cause of action did not arise until October, 1949. There has been no unreasonable delay and no change in circumstances prejudicial to defendants since plaintiffs’ discovery of the facts. Therefore, the cause of action does not appear to be barred either by limitations or by laches.”

Therefore, the mere existence of a public record, such as the recording of an assignment or the issuance of a patent, does not constitute constructive notice under circumstances such as these.

In *Anglo-California Nat. Bank of San Francisco v. Lazard*, 106 F. 2d 693, 704 (C. C. A. 9), the court says:

“. . . Moreover, in view of the fact that the confidential relationship between appellants and the owners of the property continued within three years of the bringing of the suit, lack of diligence was not present in failing to make an independent investigation of the 1915 and 1917 sales before 1931.”

The Supreme Court of California in *Rutherford v. Rideout Bank*, 11 Cal. 2d 479, 485, 80 P. 2d 978, 982, clearly states, at page 485, as follows:

“The rule is clearly stated in *Victor Oil Co. v. Drum*, 184 Cal. 226, 241, 193 P. 243, 249: ‘The courts will not lightly seize upon some small circumstance to deny relief to a party plainly shown to have been actually defrauded against those who defrauded him on the ground, forsooth, that he did not discover the fact that he had been cheated as soon as he might have done.’ . . . It is true that the plaintiff could have discovered the inadequacy of the price by inquiry but this alone would not necessarily have been sufficient to warn her of the fraud in the light of her belief in the representation, by one in whom she had implicit trust and confidence, that it was, for her best interest to make the sale, even if for only \$5 an acre, because otherwise, she would lose everything by foreclosures.

“ . . .

“ . . . The court found to be true the allegation ‘that prior to the date last mentioned (September 15, 1927) the plaintiff had no knowledge of the herein alleged fraud and deceit, nor of any cause or notice to suspicion that fraud or deceit of any kind or character had been practiced upon her.’ This finding that plaintiff had no actual knowledge of the fraud nor of any fact which would lead her to suspect that a fraud had been practiced upon her, coupled with the finding of a confidential relationship, can lead to only one conclusion, that the action was not barred. It is therefore sufficient.”

In another California case, *Hobart v. Hobart Estate Co.*, 26 Cal. 2d 412, 439, 159 P. 2d 958, 973, at page 439, the court says:

“Another pertinent factor is that there was a fiduciary relationship between the parties at the time of the fraudulent representations. Although the general rules relating to pleading and proof of facts excusing a late discovery of fraud remain applicable, it is recognized that in cases involving such a relationship facts which would ordinarily require investigation may not excite suspicion, and that the same degree of diligence is not required. In *Rutherford v. Rideout Bank*, 11 Cal. 2d 479, 486, 80 P. 2d 978, 117 A. L. R. 383, it was said that because of such a relationship plaintiff could not be charged with lack of diligence even though an inquiry would have disclosed the true value of the property involved. . . . Defendants argue that the fiduciary relationship terminated when the sale was completed and that plaintiff was no longer entitled to the benefit of the rule. The relationship, nevertheless, did exist at the time of the asserted fraud, and plaintiff was under no duty to make a complete search and reexamination of the entire transaction immediately after it took place merely because the fiduciary relationship between the parties was terminated thereby.

“ . . .

“ . . . *In the absence of a duty to make inquiry, as pointed out above, the statute does not run merely because the means of discovery were available, and plaintiff is not compelled to disprove that such means existed.*” (Italics ours.)

See also:

*Seeger v. Odell*, 18 Cal. 2d 409, 415, 115 P. 2d 977, 980 (S. Ct. of Calif.);

*Neet v. Holmes*, 25 Cal. 2d 447, 467, 468, 154 P. 2d 854, 864;

*Adams v. Harrison*, 34 Cal. App. 2d 288, 295, 296, 298, 93 P. 2d 237, 241, 242, 243.

3. **The Purported Conversation Between Sears and Croan in 1950 Relating to the Patent in Suit Was Not Constructive Notice to Intervener-Appellant.**

The suggestion in Finding XIX and the footnote thereto [R. 53] to the effect that Sears' testimony [R. 98] establishes constructive notice to intervener-appellant is also based upon serious legal error. Sears testified that while Croan was visiting Hartley Pan Company plant on business in 1950, Sears informed him about the patent. It is significant to note that Croan says nothing about this occurrence. Be that as it may, there is nothing in the record to show that Croan was an agent or representative of intervener-appellant so as to constitute him a conduit for constructive notice. In fact [R. 86] plaintiff-appellee objected strenuously to the introduction of any evidence that would have disclosed the status of Mr. Croan and his relationship to intervener-appellant. The purported disclosure by Sears to Croan who, so far as the record is concerned, was a mere employee, and which disclosure was not even made to him in the course of his employment, was not such disclosure to an agent or a representative or person otherwise occupying such a status and relationship to intervener-appellant as would constitute such disclosure to intervener-appellant.

In this connection, attention is called to 2 Cal. Jur. 2d, 859, wherein it is stated:

“For the knowledge of an agent to be chargeable to his principal when not actually communicated, it must relate to some matter within the scope of the agent's authority so that it is his duty to communicate the information to the principal.”

In this connection, see *Primm et al. v. Joyce et al.* (Dist. Ct. of App., 2d Dist.), 87 Cal. App. 2d 288, 291, 196 P. 2d 829, 831, and particularly page 291:

“ . . . And it should be emphasized that the law is well settled that notice to an agent is notice to the principal only as to those things within the scope of the agency.”

## II.

**The Findings That Intervener-Appellant Had Timely Actual Notice of the Facts Constituting the Alleged Fraud Finds No Substantial or Credible Support in the Evidence. The Testimony of Plaintiff-Appellee's Witnesses on the Issue of Actual Notice Is so Confused, Contradictory, Uncertain and Inherently Incredible as to Be Without Any Probative Value.**

### 1. Testimony of Casimir A. Miketta.

As in the case of the issue of constructive notice, we must begin with Mr. Miketta, in analyzing the evidence to see whether it supports the findings that intervener-appellant had actual notice of the adverse claims of Sears and Schrader or of any other facts from which it could or should have discovered the alleged fraud. It will be recalled that in May and June of 1947, certain negotiations were had between Eversharp, Inc., and the stockholders of intervener-appellant relating to an option agreement to purchase the shares of these stockholders [Finding XVI, R. 51, 199, 200]. In the course of said negotiations, Eversharp, Inc., stated that it would require that all patents, whether granted or pending, would have to be assigned to it, and a general form of assignment was prepared for this purpose [R. 117, 118, 142, 143; Pltf. Ex.

B, R. 178, 200]. Mr. Taube testified that some time in June Mr. Miketta told him that Sears and Schrader were not willing to sign the general form of assignment that had been prepared for the reason that they were then engaged in or about to engage in a competitive business, and that he had instructed Mr. Miketta to prepare a form which would not jeopardize Sears' and Schrader's position as far as their new business was concerned [R. 255, 264].

Mr. Miketta, in his first affidavit [Pltf. Ex. 4, R. 200] stated among other things that in the early part of June, 1947, he presented to Sears and Schrader a form of document which he had prepared being in effect a general assignment by them of inventions and patent rights to intervenor-appellant but that they refused to sign the same stating that they were not obliged in any manner to assign inventions to intervenor-appellant and that the aforesaid position taken by Sears and Schrader on this matter and certain agreements prepared by one Sidney Snyder, former attorney for intervenor-appellant, were discussed with Mr. Taube, Mr. Marcus, general attorney for intervenor-appellant, and Mr. Foster, patent counsel for Eversharp, Inc., at various conferences, and that it was agreed by the aforesaid parties that since a general assignment of inventions and patent rights could not be procured from Sears and Schrader that shop rights be obtained and this solution appeared to meet with the approval of all parties at such conferences [R. 201].

In his testimony at the trial, however, Mr. Miketta backs away from the statement in his affidavit and asserts that Mr. Taube and Mr. Marcus were not present at the time that the memorandum agreement prepared by Sidney

Snyder were discussed [R. 119]. Although Mr. Miketta was repeatedly pressed for a direct answer as to when he discussed Sears' and Schrader's position and all other related matters (referred to in his affidavit) with Mr. Taube and Mr. Marcus [R. 120], nowhere in the record of the trial do we have a direct and unequivocal statement by Mr. Miketta that he did in fact discuss these matters with Mr. Taube and Mr. Marcus. The most that it was possible to elicit from Mr. Miketta on this point was that he had a distinct recollection that Ward Foster discussed the matter with him; that it had been discussed previously during the early discussions in May of 1947 (although Mr. Miketta fails to state precisely with whom) that "probably everybody in the place knew about it," that Mr. Marcus knew about it and Mr. Taube knew about it (although Mr. Miketta again does not state how he arrives at that conclusion), and that he, Miketta, was convinced that "everybody knew about it." Mr. Miketta finally gives up the ghost by speculating that these communications might have been made to intervener-appellant's representatives by a process of thought transference [R. 120].

We respectfully direct the Court's attention to the cross-examination of Mr. Miketta on pages 118, 119, 120 of the record where we believe the Court will search in vain for one unequivocal clear statement by Mr. Miketta that he directly discussed any of these matters with Mr. Taube, Mr. Marcus or any other representative of intervener-appellant.

The confused, uncertain and contradictory testimony of Mr. Miketta elicited by the cross-examination referred to above shows how utterly insecure are the plaintiff-

appellee's assertions (and the Findings of the Trial Court) that Mr. Miketta was a source of actual notice to intervenor-appellant of the adverse claims of Sears and Schrader and of the alleged fraud.

Now, let us examine the record to see what Mr. Miketta did about the alleged refusal of Sears and Schrader to make a general assignment, to see whether what he did could have been a source of notice to intervenor-appellant of the adverse position taken by Sears and Schrader on the matter of assigning inventions and patents.

Mr. Miketta stated in his affidavit [Pltf. Ex. 4, R. 201], that on June 5, 1947, he procured the execution of Plaintiff's Exhibits C and D attached to Plaintiff's Exhibit 1-B by Sears and Schrader, the originals of which it is to be noted were forwarded to Mr. George Breslin, counsel for Eversharp, and later delivered by Mr. Breslin to Mr. Marcus. An examination of these unilateral documents [R. 180-184] would not, in June of 1947, and indeed do not now remotely suggest that intervenor-appellant is relinquishing, granting or compromising any rights with respect to inventions made by Sears and Schrader while in its employ. On the contrary, these instruments first purport to be releases from Sears and Schrader in favor of intervenor-appellant and, second, purport to grant to intervenor-appellant certain rights with respect to inventions and patents covering apparatus used in intervenor-appellant's plant by Sears and Schrader.

Of significance is the closing language of these two documents which state that Sears and Schrader are granting these license rights *insofar as they have a right to grant such rights.*



Anyone reading these unilateral documents would conclude that perhaps they were thought necessary by patent counsel for both intervener-appellant and Eversharp to protect them with respect to fringe or incidental rights that Sears and Schrader might have brought with them into the plant of intervener-appellant. Whatever construction one might place upon these unilateral documents, it is clear that certainly no one reading them would be alerted to the fact that these documents were intended to be a relinquishment or a compromise or a grant of rights from intervener-appellant to Sears and Schrader covering inventions perfected by them while in intervener-appellant's employ. There is nothing in these unilateral instruments which was or could have been a source of notice to intervener-appellant that Sears and Schrader were asserting claims to the ownership of the invention embodied in the patent in suit adverse to intervener-appellant.

Mr. Miketta himself half-heartedly admitted that these releases in no way released Sears and Schrader from any obligation to assign inventions made in the course of their employment [R. 131, 132]; and counsel for plaintiff-appellee so stipulated [R. 138].

The utter unreliability of Mr. Miketta's testimony with respect to his purported alleged direct and actual communications to intervener-appellant on the matter of the position taken by Sears and Schrader is further evidenced by the peculiar nature of the compromise that was purportedly made between Sears and Schrader and intervener-appellant. Mr. Miketta knew and so admitted on the stand that as a matter of law intervener-appellant had at least shop rights with respect to inventions made by Sears and

Schrader [R. 129]. Furthermore, an inspection of the so-called Snyder document [Deft. Ex. D-6, R. 187 *et seq.*] does not, as a matter of law, disclose a relinquishment of intervener-appellant's rights to Sears' inventions. Sears' inventions embodied in the patent which is the subject-matter of this suit were admittedly made in the course of his employment for intervener-appellant in its plant and at its expense [Finding XIII, R. 47; Sears, R. 100; Kimberly, R. 268, 269]. Under these admitted circumstances, the invention and the right to any patent which might issue thereon would, as a matter of law, belong to intervener-appellant (*Standard Parts Co. v. Peck*, 264 U. S. 52). At the very least, it should have been apparent to Mr. Miketta that intervener-appellant certainly had a substantial basis for claiming ownership to Sears' inventions and any patents which might be issued thereon.

Had Mr. Miketta fully communicated the Sears-Schrader position to intervener-appellant as he claims to have done, wouldn't we logically expect that intervener-appellant or its imminent successor, Eversharp, would have said substantially as follows?

"We understand that Sears and Schrader are refusing to sign a general assignment of patent rights covering inventions made while in Kimberly's employ. Let them refuse. We are the owners of all inventions made by them in our employ and we shall, in our good time, compel them to assign to us patent rights covering such inventions. In any event, the very least that we have with respect to these inventions are shop rights!"

What sense does it make therefore to assert that intervener-appellant accepted such shop rights which is the

very least that it had in any event, if the acceptance of such shop rights was in any sense intended to be a relinquishment to Sears and Schrader of the full ownership of the inventions which intervener-appellant believed it owned and which even a superficial discussion of Defendants' Exhibit D-6 [R. 187] and the background under which it was executed would have confirmed.

We earnestly submit therefore that Mr. Miketta must be very much mistaken in his assertion that he ever discussed the adverse claims of Sears and Schrader with intervener-appellant's executives or other representatives.

Nor was the conduct of Mr. Miketta in December of 1953 after intervener-appellant discovered the pendency of this action consistent with his contention, nebulous as it is, that he had informed representatives of intervener and that said representatives knew of the refusal of Sears and Schrader to assign patent rights to intervener-appellant on the ground that they were not obligated to do so. Although approached in December of 1953 for an explanation of how plaintiff-appellee happened to hold patent rights to an invention made by Sears and Schrader while in intervener-appellant's employ, Mr. Miketta significantly failed to call to the attention of Mr. Taube or Mr. Marcus that they were in on these alleged conferences and certainly knew about the arrangement that had allegedly been worked out with Sears and Schrader.

Mr. Miketta also significantly failed to call to the attention of Mr. Taube or Mr. Marcus that in 1950 and again in 1952 he had discussed this patent with Mr. Taube. We also call this Honorable Court's attention to Mr. Miketta's letter of December, 1953, addressed to Mr. Marcus, at-

tached to Plaintiff's Exhibit 4 [R. 206]. This is hardly a letter for one to write to a person who is supposed to be familiar with the matters alluded to therein. This letter is couched in language that would be used in addressing a person that was hearing the facts for the first time. It must be borne in mind that in this December, 1953, visit to Mr. Miketta, Mr. Marcus made it known to him that intervener-appellant was aggrieved at the discovery that Mr. Sears and Mr. Schrader had patented the invention covering the swedging machine [Miketta, R. 249]. It is difficult to understand how Mr. Miketta could have resisted the impulse to immediately point out that there was no basis for intervener-appellant's feeling aggrieved since according to Mr. Miketta this was a matter that was certainly known to it and had all been worked out with Sears and Schrader back in 1947 with its full knowledge and consent.

Mr. Miketta's confusion and the unreliability of his testimony is again illustrated by the following: He first testified on September 20, 1954 [Intervener's Ex. B, R. 244] that he had never represented Mr. Sears prior to June 8th or 9th of 1947. Later it was necessary for him to correct this testimony by the execution of his second affidavit [Pltf. Ex. 4-A, R. 211, 212] in which he belatedly stated that he had been employed by Sears and plaintiff-appellee in May of 1947. He was also confused on other dates when he testified [Intervener's Ex. B, R. 246] that he had discussed the preparation of the releases [Pltf. Exs. C and D attached to Pltf. Ex. 1-B, R. 180, 181] on May 28, 1947; although he testified elsewhere that the entire matter of obtaining shop rights and re-

leases from Sears and Schrader did not even arise until a date subsequent to June 2nd or 3rd, 1947, when for the first time Sears and Schrader purportedly refused to execute a general assignment [R. 112-115, 200].

Mr. Miketta's testimony, particularly when viewed in the light of the very awkward position which he occupied by reason of his dual representation of the parties to the controversy, affords no support to the Finding that intervener-appellant had actual notice through Mr. Miketta of the adverse claims of Sears and Schrader.

**2. The Contention of Plaintiff-Appellee That Sears and Schrader Back in May and June of 1947 Asserted That They Were Not Obligated to Assign Inventions to Intervener-Appellant Made by Them While in Its Employ Is Refuted by Plaintiff-Appellee's Exhibit D.**

Plaintiff-appellee makes much of the proposition that intervener-appellant was informed by Sears and Schrader back in May and June of 1947 that they had no obligation to assign inventions to intervener-appellant made while in its employ. Plaintiff's Exhibit D [R. 181-184] completely belies that contention. In this agreement, Schrader expressly assigns to intervener-appellant an invention covering a resilient cartridge "made by said Clarence O. Schrader during his employment by Kimberly Corporation. . . ." It is this very instrument, moreover, which plaintiff-appellee contends was an instrument which was or should have been a source of actual notice to intervener-appellant that Sears and Schrader were asserting that they *were not obligated* to assign inventions to it made while in its employ. It is difficult indeed to conceive a more preposterous contention that this Exhibit D

should have been notice to intervener-appellant of facts directly contrary to the facts disclosed by its contents. The true meaning and the evidentiary value of this document, Exhibit D can be determined by this Honorable Court without the necessity of hearing or seeing the witnesses.

### 3. Testimony of Kenneth F. Croan.

Mr. Croan first filed an affidavit [Pltf. Ex. 2, R. 191] in which he stated that some time prior to June, 1950, he saw a copy of the patent in suit at the executive offices of intervener-appellant. It is to be noted first that this affidavit makes no mention of any conversations had by Croan with anyone nor does the affidavit identify any executive of intervener as being present at that time. It should be remembered that Mr. Croan was employed by plaintiff-appellee as its production manager [R. 84, 85] and it is not unreasonable to suppose that in making this affidavit that he tried to make it as favorable to his employer's case as his memory of the circumstances would permit. Is it not reasonable to expect, therefore, that at the time Mr. Croan made this affidavit he must have searched his memory concerning the circumstances under which he saw the copy of the patent? If he did search his memory what fact could be more important than that he remembered talking to Mr. Taube at the time he saw the patent? Yet his first affidavit makes no mention of any conversation with Mr. Taube.

But approximately three months later, we suddenly find Mr. Croan not only testifying [R. 88, 89] that he had conversations with an executive of intervener-appellant at the time he saw the copy of the patent, but that that executive officer was Mr. Taube. But how does Mr.

Croan come to the belated conclusion that it was Mr. Taube? Because he actually had a present recollection of having talked to Mr. Taube? Not at all! Mr. Croan admits in effect that he is merely speculating and surmising and that somehow, by some mental process, he has come to the conclusion that the only person he could have talked to must have been Mr. Taube [R. 89].

Mr. Croan's confusion is again demonstrated when he states [R. 85] that he was employed by intervener-appellant for a period of six months in 1950 and that it could have been even earlier than January, 1950, that he had these alleged conversations with Mr. Taube, although the patent was not issued until February 21, 1950 [R. 90]. It would seem difficult to ascribe any probative value to Mr. Croan's testimony.

**4. The Eversharp-Kimberly Option Agreement of June 14, 1947, Afforded No Actual Notice to Intervener-Appellant of the Adverse Claims of Sears and Schrader and the Alleged Fraud When Taken Into Consideration With the Circumstances and Background Surrounding Its Preparation.**

During May and June of 1947, there were negotiations between Eversharp and the stockholders of intervener-appellant with respect to the option agreement covering the purchase and sale of the shares of said stockholders. These negotiations culminated in the execution of an option agreement dated June 14, 1947 [R. 176, 177]. In the clause which obligated the stockholders to assign inventions, "know-how," etc., Sears was specifically excepted. Mr. Taube's explanation as to the reason for this omission is very clear and convincing. He pointed

out that he had been informed by Mr. Miketta that Sears was going into a new and competitive business; that he, Mr. Taube, did not believe that Sears was or should be obligated to assign future inventions and that as far as past inventions were concerned, he relied upon Mr. Sears' previous representations to him that everything patentable had already been taken care of [R. 255, 260, 264]. Under these circumstances and in the light of these background facts, this clause in the June 14, 1947, option agreement excepting Sears from the obligation to assign patents did not alert Mr. Taube or any other executive of Kimberly Corporation concerning the alleged fraud perpetrated against intervener-appellant in the matter of the swedging machine patent—the patent in suit. Among the stockholders who also signed the option agreement was one H. Donovan Green. The phrase “and H. Donovan Green” was added by later insertion, after the name of Sears, to except him also from the clause requiring stockholders to assign inventions and “know-how,” although Green actually was, *by express contract*, obligated to assign inventions [Deft. Ex. D-6 attached to Pltf. Ex. 1-B, R. 187, 188, 189]. Obviously, therefore, the reasons for the omission of Sears and of Green were based on grounds other than they were not obligated to assign past inventions made in the course of their employment.



### III.

#### **The Findings by the Lower Court Being Clearly Erroneous, It Is the Duty of This Court to Reverse.**

Rule 52(a) F. R. C. P. has been interpreted by the Supreme Court, as well as by this Honorable Court and other Federal Courts of Appeal, to the effect that even if there is evidence to support it, yet if clearly erroneous, the trial court must be reversed. Authorities to this effect will be considered hereinafter.

Especially is such reversal manifestly proper when much of the evidence is in the form of documents and affidavits, which the appellate court is in as good a position to appraise as the trial court.

Judge Frank in *Orvis v. Higgins*, 180 F. 2d 537 (C. A. 2), discusses this as follows at page 539:

“ . . . Where a trial judge sits without a jury, the rule varies with the character of the evidence: (a) if he decides a fact issue on written evidence alone, we are as able as he to determine credibility, and so we may disregard his finding. (b) Where the evidence is partly oral and the balance is written or deals with undisputed facts, then we may ignore the trial judge's findings and substitute our own, (1) if the written evidence or some undisputed fact renders the credibility of the oral testimony extremely doubtful, or (2) if the trial judge's finding must rest exclusively on the written evidence or the undisputed facts, so that his evaluation of credibility has no significance. (c) But where the evidence supporting his finding as to any fact issue is entirely oral testimony, we may disturb that finding only in the most unusual circumstances.

“It follows that evidence sufficient to support a jury verdict or an administrative finding may not suffice to support a trial judge’s finding. So in the instant case, perhaps, on the record evidence, we might have affirmed a jury’s verdict or an administrative agency’s finding in plaintiff’s favor. That, however, we need not decide. For here the finding is that of a trial judge, and the evidence consists in large part of facts neither side disputes, in circumstances such that the trial judge’s evaluation of credibility becomes unimportant. In short, for reasons we shall state, the undisputed facts are such that we have a ‘definite and firm conviction’ that the trial judge was mistaken in finding that Orvis and Mrs. Orvis ‘each pursued an independent course’ in creating the 1934 trusts, and that no reciprocity was intended. We therefore hold that finding ‘clearly erroneous,’ and hold, rather, that each of those trusts was made in consideration of the other.

“In so holding we assume that, because of the ‘evenescent factor which cannot come before us’—*i.e.*, the demeanor of the witnesses—the trial judge fully believed everything they said. Even so, there is nothing in the testimony which in any manner offsets what we believe to be the virtually irresistible inference drawn from the undisputed facts. . . . The finding of an absence of such an intention must, then, depend not on an inference drawn from anything positive in the testimony concerning statements of intention made by Mr. and Mrs. Orvis, but on an inference from their conduct. And that inference, in turn, must rest on a belief in the purely chance concurrence of several events, although the coincidental occurrence of those events would ordinarily be highly improbable. Such a belief ought not to be the foundation of a trial judge’s finding on a fact issue, in favor

of that side having (like plaintiffs here) the burden of proof as to that issue, unless the purely chance character of those events is positively confirmed by clear evidence. There is no such confirmatory evidence here.”

This reasoning is especially applicable here, and is in conformity with the leading case of *United States v. United States Gypsum Co.*, 333 U. S. 364, 394, 68 S. Ct. 525, wherein the Court makes the oft-repeated statement at page 394:

“ . . . That rule prescribes that findings of fact in actions tried without a jury ‘shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.’ It was intended, in all actions tried upon the facts without a jury, to make applicable the then prevailing equity practice. Since judicial review of findings of trial courts does not have the statutory or constitutional limitations of findings by administrative agencies or by a jury, this Court may reverse findings of fact by a trial court where ‘clearly erroneous.’ The practice in equity prior to the present Rules of Civil Procedure was that the findings of the trial court, when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court. The findings were never conclusive, however. A finding is ‘clearly erroneous; when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.’”

This Honorable Court has repeatedly endorsed the doctrine set forth in this Supreme Court case.

One of the cases is *Equitable Life Assur. Soc. of the United States v. Irelan*, 123 F. 2d 462 (C. C. A. 9). In that case, although the trial court found that the insured died by drowning, this Court reversed that finding as follows at page 464:

“In our view, the evidence produced here so clearly points to suicide as to overcome the presumption of accident. We need not inquire whether, as appellant contends, the opinion testimony of appellees’ medical witness ought to have been excluded. The evidentiary value of the opinion is so inconsiderable as to render it worthless for all practical purposes; and the fact that it was given orally does not require the reviewing court to accept it as adding to the weight of the finding below.”

Another is *Pacific Portland Cement Co. v. Food Machinery & Chemical Corporation*, 178 F. 2d 541 (C. A. 9).

In *Smyth v. Erickson*, 221 F. 2d 1, also a decision by this Court, the Court reversed the trial court and, on page 4, says:

“. . . The trial court made a finding that Mazie incurred liability for the attorney fees with the intention and expectation on her part that she would be reimbursed therefor from the guardianship estate. Under Rule 52(a) of the Federal Rules of Civil Procedure, 28 U. S. C. A., the findings of the trial court must be sustained unless clearly erroneous. Where, however, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed, the finding is clearly erroneous and must be set aside.”

In decisions of other appellate courts as well, the presumed sanctity of the findings of fact have been held ineffective when the findings are clearly erroneous.

See:

*Aetna Life Ins. Co. v. Kepler*, 116 F. 2d 1 (C. C. A. 8).

In another case, *In re Leichter*, 197 F. 2d 955 (C. A. 3), the Court of Appeals at page 957 says:

“ . . . The record, however, utterly fails to support the Referee's determination that the bankrupt was ‘a large stockholder’ in the corporation. Indeed, it is bare of any proof as to the extent of the stock holdings of the bankrupt; there is only testimony to the effect that he was a stockholder—nothing more, nothing less. Moreover, there is nothing in the Referee's statement of facts or in his conclusion of law which gives any light as to his reason for finding that the bankrupt was ‘a large stockholder.’ Apparently the Referee based his finding on ‘speculation’ or ‘intuition.’

“On that score, we have on previous occasions held that ‘*A finding of fact must have more substantial foundation than an intuition . . .*’ and that while the trier of the facts ‘*has the primary function of finding the facts . . . weighing the evidence, and choosing from among conflicting factual inferences and conclusions those which it considers most reasonable*’ it is well-settled that speculation cannot be substituted for proof and “the requirement is for probative facts capable of supporting with reason, the conclusions expressed in the verdict.” ’ ” (Italics ours.)

See also:

*Galena Oaks Corporation v. Scofield*, 218 F. 2d 217 (C. A. 5);

*Bruce v. McClure*, 220 F. 2d 330 (C. A. 5);

*United States v. Forness et al.*, *supra*.

Of particular interest is *Gindorff v. Prince*, 189 F. 2d 897 (C. A. 2), in connection with the fantastic testimony of Croan, and with the inarticulate and nebulous testimony of Mr. Miketta.

The appellate court reversed the judgment on the ground of the incredible nature of the testimony of plaintiff, Gindorff.

Gindorff asserted that as an employee of J. P. Morgan & Company he gave valuable services to Prince who was a man of great wealth—about \$80,000,000.00. The pertinent portions of the decision reversing the award to Gindorff are as follows:

On page 898, the Court stated:

“We are under no illusion as to the serious concern, under our own decisions as well as others, with which we must approach the step of reversing a trial judge on issues so dependent upon veracity. Nevertheless our ultimate responsibility is clear under the Rule itself and has been restated by the Supreme Court, notably in *United States v. United States Gypsum Co.*, 333 U. S. 364, 395, 68 S. Ct. 525, 542, 92 L. Ed. 746, where the court went on to say: ‘A finding is “clearly erroneous” when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.’ This court has that definite and firm conviction.”

On page 899, the Court further stated:

“. . . All this is but one of many reflections of the uncertainties in plaintiff’s testimony, as well as his rather hazy knowledge of defendant’s affairs with which he was supposed to be so familiar. So at his pre-trial examination, plaintiff talked in terms of

futurity, rather than present contract. Thus he then quoted the defendant as saying: 'I have decided that I would like to have you come with me. Before you do so, I want to make certain changes in my organization so as not to disturb them. Then I want you to come with me and act as personal adviser and consultant to me; and, in time, I will appoint you "trustee" . . . I will appoint you a trustee of the Maine company, that being the top holding company of my whole enterprise. Meanwhile I want you to stay at Morgan & Company until I get these organization changes made.'

"In May, 1935, a month after this agreement, plaintiff says he told defendant that he had an offer of another position at double his Morgan salary, but that defendant asked him to 'remain at Morgan's until I get these changes made' and he agreed to do so. But here hope deferred apparently did not make the heart sick. For in conversations on January 9 and 10, 1936, defendant appeared still to be talking in terms of futurity. 'So I will ask you to wait a little longer, and meanwhile remain where you are at Morgan's.' (Plaintiff said that there were also present at the conversation of January 9 Messrs. McDonough and Barriger; McDonough died in 1941 and at the trial Barriger denied—as did defendant—that the conversation ever took place.)"

On page 902, the Court said:

"The final scene on November 10, 1945, is as curious as any. According to plaintiff's testimony he went to see defendant at Newport, and defendant asked him to go to Chicago to undertake a study of the losses of the Stock Yards Company. Plaintiff replied that because of the time involved he would have to take a leave of absence or resign from his business

position, but that he was prepared to resign if the agreement between them would be put into effect. Then Prince told plaintiff that he had appointed his own nephew in plaintiff's place and plaintiff was not to be trustee and officer in his companies. Plaintiff protested that he was shocked, and asked if he was not entitled to compensation or at least out-of-pocket expenses. Defendant asked what they were; plaintiff gave \$2,500 as the figure; and defendant, saying 'That is nothing, my boy; nothing,' gave him a check. But plaintiff would not receive it outright and insisted on giving a note for it; this is the transaction previously noted where the earlier debt was consolidated in a single note of \$3,300, to be repaid at the rate of \$100 a month. Plaintiff's explanation of his strange course is that he wanted to prevent the defendant from claiming that the check was in full payment for all his years of service. Defendant's own testimony was that 'he came down to borrow money and I let him have it. . . . That he was hard up and wanted some money, you understand, to help him out, and I let him have the money.'

"Against this background the services which eventually impressed the district judge as unusual assume their proper perspective. We agree with defendant's statement in his brief: 'Plaintiff's alleged services were no more than a voluntary and relatively inconsequential investment of his spare time in his campaign for self-advancement. He admitted that they were rendered with no thought of money compensation but only in appreciation of courtesies and assistance extended to him by defendant. His claim (which he did not assert for over twelve years) was an after-thought prompted by disappointment over defendant's failure to give him employment.'

". . .



“ . . . Plaintiff filed extensive findings of fact which the court accepted; while defendant filed a motion for a new trial which came on for a hearing in November, 1949.

“ . . .

“As they stand, therefore, there is a certain inconsistency or hiatus in the findings which we should find troublesome were we to accept them as filed.” (P. 903.)

“ . . .

“ . . . The findings therefore do not support the judgment rendered and reversal would seem necessary in any event. We need not pursue this further, however, since we hold that neither express contract nor agreement to pay for services was proved by credible evidence.” (P. 904.)

#### IV.

**This Being an Equity Case Involving Fraud, the Burden of Proof of the Bar of Laches Is Upon Plaintiff-Appellee; and This Burden Was Not Sustained, Especially With Respect to the Showing of Prejudice or Injury to It.**

The lapse of time between May, 1947, to January, 1954, resulted in no prejudice or injury to Hartley Pen Company, appellee herein. No evidence whatever on this point was introduced by that appellee, although it had the burden of proof.

This is clearly stated in *Shaffer et al. v. Rector Well Equipment Co., Inc.*, 115 F. 2d 344 (C. C. A. 5), wherein, at page 347, the Court says:

“The burden of proof to establish the defense of laches is on the defendant [*United Drug Co. v. Ireland*, 8 Cir., 51 F. 2d 226; *Kelly v. Boettcher*, 8 Cir.,

85 F. 55, 62; *Rajah Auto Supply Co. v. Belvedere Screw & Machine Co.*, *supra*] and the failure of defendant to prove injury or damage to itself—a vital element in the establishment of laches—would be fatal to such a defense, even if it had maintained that defense in other respects.”

It is well understood that in equity cases involving fraud, the question of laches does not strongly appeal to the conscience of a chancellor. See *National Circle, Daughters of Isabelle v. National Order of Daughters of Isabella*, 270 Fed. 723, 734 (C. C. A. 2):

“In our opinion the complainant has not lost its right to the protection of its name by its delay in asking the relief it now seeks. Its right rests on the principle stated by Chief Justice Fuller above quoted that, where consent to the use of a name is to be inferred from knowledge and silence, such consent lasts no longer than the silence from which it springs. *Moreover, in cases of fraud the question of laches does not strongly appeal to the conscience of a chancellor.*” (Italics ours.)

The findings in this case are based upon laches, in analogy to the *California Statute of Limitations* relating to fraud. The following discussion shows that in *equity* cases there are important exceptions to the rule that the period set forth in the statutes is applicable. This is supported by California decisions, as well as by decisions of the Federal courts. Some of these Federal cases discuss *Russell v. Todd*, 309 U. S. 280.

The fraud committed here is one which is self-concealing, very much in the same way as the alleged fraud in *Lightner Mining Co. v. Lane et al.* (Supreme Ct. Cal.),

120 Pac. 771, particularly pp. 775, 776, 161 Cal. 689, 701. All of this decision is especially important since it discusses the leading United States Supreme Court case of *Bailey v. Glover*, 21 Wall. 342, 22 L. Ed. 636.

Furthermore, the Supreme Court of California, in a decision entitled *In re Harootenian's Estate*, 38 Cal. 2d 242, 247, 238 P. 2d 992, 995, asserts that lapse of time alone is *not* sufficient to support the plea of laches, when there is no change affecting the legal rights of the parties, nor any financial loss indicated. At page 247, the Court says:

"The pleadings disclose that the plea of laches interposed by demurrer and motion is also unavailing. Nothing is thus shown by which the rights of the proponents could be prejudiced on account of the delay in filing the complaint in intervention. The lapse of time alone is not sufficient to support the plea. No change affecting the legal rights of the parties nor any financial loss is indicated. No circumstances or facts are alleged which would sustain the judgment of dismissal on that ground. *Cahill v. Superior Court*, 145 Cal. 42, 47, 78 P. 467; *Thorn-ton v. Middletown Educational Corp.*, 21 Cal. App. 2d 707, 711, 70 P. 2d 234. The intervenor is therefore entitled to a trial on the merits of the contest if she is an interested person who may contest the will."

This decision affirmed a decision by the District Court of Appeal, Fourth District, 228 P. 2d 595, 599. The District Court of Appeal therein held that there must be a showing first, of neglect or omission to assert a right, and, second, of a *consequential passage of time which caused prejudice to an adverse party*. It quotes from other California cases to the same effect.

*There is not an iota of evidence in this case showing any prejudice to plaintiff that would result by the mere lapse of time.*

Indeed, the Supreme Court of the United States is in accord with this California doctrine in *Holmberg et al. v. Armbrecht, et al.*, 327 U. S. 392, 66 S. Ct. 582, and particularly pages 396 and 397. This case, dealing with a fraud case, also discusses the leading cases of *Bailey v. Glover* and *Russell v. Todd, supra*, in connection with Federal statutes of limitations. The decision is in conformity with the California rule discussed in *In re Harootenian's Estate, supra*.

In view of the California cases cited above and the United States Supreme Court case just discussed, intervenor urges that the defense of laches should fail in a situation where there was a wilful *concealment* of a cause of action, and where the perpetrator of the fraud suffered no detriment by intervenor's delay in instituting the present action.

In fact, this Honorable Court, as recently as October 18, 1954, in *Sidebotham v. Robison*, 216 F. 2d 816, states at page 827:

"Of course, there may be estoppel and laches, even in such cases. But these are defensive matters under the Federal Rules of Civil Procedure, Rule 8(c). See *Topping v. Fry*, 7 Cir., 1945, 147 F. 2d 715; *Copeland Motor Co. v. General Motors Corp.*, 5 Cir., 1952, 199 F. 2d 566; *Callaway v. Hamilton Nat. Bank of Washington*, 1952, 90 U. S. App. D. C. 228, 195 F. 2d 556, 559-563. This also conforms to the substantive law of California. Unlike the statute of limitations, in which lapse of time alone bars the

remedy, bar by reason of laches does not arise unless there appear some circumstances, in addition to mere lapse of time, showing prejudice to some one from long delay. See, *Cahill v. Superior Court*, 1904, 145 Cal. 42, 46, 78 P. 467; *Swart v. Johnson*, 1942, 48 Cal. App. 2d 829, 833-834, 120 P. 2d 699; *Field v. Bank of America*, 1950, 100 Cal. App. 2d 311, 223 P. 2d 514."

### Conclusion.

While laches and other statutes of repose are intended to serve the salutary purpose of barring stale claims it is equally settled that they should not be employed as a shield for fraud. Much of the evidence in this case is documentary. Some of these documents standing alone apart from any oral testimony eloquently testify to the utter baselessness of the main contentions of plaintiff-appellee in this case. With respect to such oral testimony which was introduced by plaintiff-appellee, we believe that an analysis of the same will disclose that this testimony is of such an unsatisfactory nature as to be virtually worthless.

It is respectfully submitted that the judgment of the trial court should be reversed.

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EUGENE H. MARCUS,

*Of Counsel.*



No. 14701  
IN THE  
**United States Court of Appeals**  
FOR THE NINTH CIRCUIT

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KIMBERLY CORPORATION, a corporation,

*Appellant,*

*vs.*

HARTLEY PEN COMPANY, a corporation, LINDY PEN Co.,  
Inc., a corporation, and SIDNEY LINDEN, individually  
and doing business as Adams-Linden Co.,

*Appellees.*

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**ANSWERING BRIEF OF APPELLEE HARTLEY  
PEN COMPANY.**

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No. 14701  
IN THE  
**United States Court of Appeals**  
FOR THE NINTH CIRCUIT

---

KIMBERLY CORPORATION, a corporation,

*Appellant,*

*vs.*

HARTLEY PEN COMPANY, a corporation, LINDY PEN Co.,  
INC., a corporation, and SIDNEY LINDEN, individually  
and doing business as Adams-Linden Co.,

*Appellees.*

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**ANSWERING BRIEF OF APPELLEE HARTLEY  
PEN COMPANY.**

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I.  
**INTRODUCTION.**

We suggest that Appellant's Opening Brief does not comply with Rule 18(d) of this Court by its failure to state "as particularly as may be wherein the findings of fact and conclusions of law are alleged to be erroneous." Appellant's brief does not challenge a single Finding of Fact by number and we, as well as this Court, must guess which Findings of Fact or portions thereof are alleged by appellant to be erroneous. Appellant's Specification of Errors [R. 9-10]\* does not refer specifically

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\*Abbreviations "R." followed by numbers will hereinafter designate transcript of record and page numbers.

to any Finding by number. It appears that most of the Findings of Fact are not challenged in any way, or even referred to, by appellant.

Appellant's brief, we suggest, is a mere quibble over a few isolated evidentiary facts and makes no attempt to show wherein the Findings of Fact are "clearly erroneous." This is appellant's burden on this appeal, and, we submit, it has wholly failed to carry it to any degree whatever.

In view of the confusion, both as to form and substance in appellant's brief, we make no attempt to answer its contentions seriatim, feeling that a full and fresh exposition of the facts and law will be more helpful to the Court.

## II.

### STATEMENT OF THE CASE.

#### (A) The Manner in Which the Questions Involved Were Raised.

This action was originally filed on April 9, 1953, by plaintiff Hartley Pen Company against defendant Lindy Pen Co., Inc., for infringement of Letters Patent No. 2,498,009 owned by the plaintiff [Finding III, R. 41]. It was initially a simple action for patent infringement. All proceedings in the action and the trial were before the Hon. Wm. C. Mathes, United States District Judge.

On January 15, 1954, appellant Kimberly Corporation filed its Motion to Intervene as a plaintiff upon the ground that it was the equitable owner of the patent in suit and, as such, has an interest in the patent infringement action. Such motion was granted by the District Court by an order entered March 11, 1954 [Finding V, R. 42], and the original intervenor's Complaint appears at R. 3.

Plaintiff moved to dismiss Intervener's Complaint on various grounds, including the defense that intervener's claim to title of the patent in suit was barred because not commenced within either the two-year or three-year periods specified by Sections 339(1) and 338(4) of the California Code of Civil Procedure, and upon said motion Intervener's Complaint was dismissed by the District Court with leave to intervener to file an amended complaint in intervention, and on July 13, 1954, appellant filed its Intervener's First Amended Complaint, which appears at R. 16.

By a motion for summary judgment filed August 6, 1954, plaintiff Hartley Pen Company sought the dismissal of Intervener's First Amended Complaint, upon the grounds that intervener's claim to title of the patent in suit was barred by the statutes of limitation of the State of California and by laches of the intervener. Plaintiff's motion for summary judgment was denied by the District Court. On October 20, 1954, plaintiff Hartley Pen Company filed its answer to Intervener's First Amended Complaint, setting forth as affirmative defenses that the claim of intervener Kimberly Corporation of title to the patent in suit is barred by the statutes of limitation of the State of California and by laches [R. 38].

A separate trial was had pursuant to Rule 42(b) before the District Court on October 26, 1954, on the issues raised by the affirmative defenses of laches and the California statutes of limitation set forth in plaintiff's answer, and on November 23, 1954, the District Court entered its order [R. 40] dismissing Intervener's First Amended Complaint on the merits on the ground of laches. On December 22, 1954, the District Court entered its Findings of Fact [R. 41], Conclusions of Law [R. 54], and Judgment [R. 55].

### **(B) The Issues.**

The only issue involved in this appeal is whether appellant's claim to title to the patent in suit is barred by the statutes of limitation of the State of California and by its own gross laches.

There are many other issues in this action which are in nowise involved in this appeal. For example, whether appellant actually has any interest in or right to the patent in suit was not considered by the District Court and is not an issue here. Similarly, the questions of validity and infringement of the patent in suit have not been considered by the District Court and are not before this Court.

### **(C) The Facts.**

Appellant's "Statement of the Case" (App. Op. Br. pp. 2-8) is largely a review of some of the allegations of its complaint in intervention [R. 16], but, since all of the pertinent allegations of such complaint are denied in the answer [R. 28], such review by appellant cannot be helpful to the Court in any way.

The pertinent facts are as follows:

The District Court found [Finding X, R. 45] that, on or about January 20, 1945, Hartley M. Sears entered into a written contract [R. 185] with Leo Mizis (now known as Leo M. Kimberly), by which Sears was employed for five years to invent and develop fountain pens and parts therefor, and was required to assign to Mizis all related inventions and future improvements. Mizis' rights in this contract were assigned by him to appellant, Kimberly Corporation, prior to September, 1945.



The District Court found [Finding XI, R. 46] that, in September, 1945, appellant, Kimberly's Corporation, employed Sears and one H. Donovan Green by a written employment contract [R. 187], which: expressly cancelled the January 20, 1945, contract; expressly employed Green to develop and promote experimental work in connection with ball pens and inks, and required Green to assign to appellant all rights to any ink formulas developed by him. This contract was silent as to any obligation on Sears to assign inventions to appellant.

This District Court found [Finding XI, R. 46] that, appellant's claim to ownership of Letters Patent No. 2,498,009 in suit is not based on any written contract.

The District Court found [Finding XII, R. 46] that, Schrader was orally employed by appellant in September, 1945.

The District Court found [Finding XIII, R. 47], that, the inventions of the machine and method of Letters of Patent No. 2,498,009 in suit were made by Sears and Schrader jointly while employed by appellant and between September, 1945, and March 1, 1947, and that such a machine was completed, in the possession of appellant, and that the machine and method were in commercial use by appellant prior to March 1, 1947.

The District Court found [Finding XIII, R. 47] that if either Sears or Schrader were under any obligation to assign the inventions of the patent in suit to appellant such obligation matured not later than March, 1947.

The District Court found [Finding XIV, R. 48] that: the machine and method of the patent in suit were fully known to appellant at least as early as March, 1947, and neither was at any time concealed from appellant by either

Sears or Schrader; and that at all times during the employment of Sears and Schrader by appellant and thereafter, appellant was represented by patent counsel, C. A. Miketta, Esq., of Los Angeles.

The District Court found [Finding XIV, R. 48] that prior to May, 1947, appellant appreciated that the machine and method of the patent in suit might be patentable, but at no time made any inquiry of Mr. Miketta or any other patent counsel as to the patentability of either the machine or method, and the question of such patentability called merely for an opinion of patent counsel.

The District Court found [Finding XV, R. 49] that: as early as June, 1947, Sears and Schrader were requested by an agent of appellant and with its authorization to execute a written agreement to assign to appellant inventions made by them during the course of their employment by appellant, and specifically all such inventions "embodied in apparatus or mechanical devices uses by Kimberly Corporation prior to May 1, 1947, in the manufacture of ball pens or parts thereof" [R. 178-180], and at that time appellant knew that the machine of the patent in suit which was in its possession had been designed by Sears and Schrader and was a mechanical device which had been so used by appellant; that both Sears and Schrader refused to execute such agreements to assign, and this fact was known to appellant prior to June 5, 1947; that Sears, in particular, so refused on the stated ground that he was not obligated to do so under the terms of his employment, and this was known to appellant prior to June 5, 1947; and that such refusals by Sears and Schrader in May or June, 1947, constituted a repudiation by them of any obligation that they might have had to assign to appellant inventions made by them during their employment by it.

The District Court found [Finding XV, R. 50] that in lieu of such written agreements to assign inventions to appellant Sears and Schrader on June 5, 1947, executed certain documents [R. 180-181] which, in effect, granted to appellant a free right to use or shop right pertaining to apparatus, machines and methods relating to ball pens used by appellant theretofore, which agreements were delivered to general counsel for appellant on or about June 11, 1947 [R. 223-224]. Mr. Marcus, counsel for appellant, acknowledged that these documents were received by him on or about June 11, 1947 [R. 160].

The District Court found [Finding XVI, R. 51] that, prior to June 14, 1947, the shareholders of appellant were negotiating an Option Agreement with Eversharp, Inc., and that on or about June 14, 1947, contracting shareholders of appellant executed a written agreement to assign to appellant all of their right in inventions, designs, improvements and methods relating to ball point pens theretofore made or acquired by them, but that Sears was expressly relieved from such covenant to assign, with the full knowledge of appellant [R. 176].

The District Court found [Finding XVIII, R. 52] that, the Letters Patent No. 2,498,009 in suit issued to appellee on February 21, 1950, the same having been assigned to appellee Hartley Pen Company by a written assignment from Sears and Schrader recorded in the patent office of November 12, 1949, and that appellee has at all times been the legal owner of said Letters Patent in suit.

The District Court found [Finding XX, R. 53] that, following its requests in May or June, 1947, to Sears and Schrader to assign to it inventions made by them during their employment by it, appellant took no action whatever to claim ownership of the inventions of Letters Patent

No. 2,498,009 in suit until appellant filed its motion for leave to intervene in this action on June 15, 1954.

The District Court also found that: appellant, having the knowledge that it had as early as May, 1947, was negligent in failing to make an independent investigation as to the patentability of the machine and method of the patent in suit [Finding XIV, R. 48]; the refusals of Sears and Schrader as early as May or June, 1947, to agree to assign to appellant inventions made by them during their employment, and the fact that appellant knew that they had during such employment designed the machine and developed the method of the patent in suit, were circumstances sufficient to put a prudent man upon independent inquiry as to their patentability, and such circumstances amounted to constructive notice to appellant as early as June 14, 1947, that such machine and method were patentable, and appellant had no right to rely upon any statements allegedly made by Sears or Schrader as to such patentability [Finding XVII, R. 51].

The District Court also found [Finding XVIII, R. 52], that, the written patent assignment recorded on November 12, 1949, and the issuance of the patent on February 21, 1950, each constituted constructive notice of the facts to appellant.

The District Court also found [Finding XIX, R. 53] that, prior to the middle of 1950, appellant received direct and *actual* notice of the issuance and contents of Letters Patent No. 2,498,009 in suit.

The District Court also found [Finding XXI, R. 53] that the delays of appellant in asserting its present claim to ownership of Letters Patent No. 2,498,009 and the inventions thereof constitute gross laches such as to bar its present claim.

The Findings of Fact of the District Court are all fully documented by footnote references to the supporting evidence. There is, therefore, ample evidence in the record to support each of the Findings.

### III.

#### SUMMARY OF THE ARGUMENT.

A. The District Court dismissed appellant's claim for relief on the ground that appellant was guilty of laches in asserting such claim, but equally applicable to bar such claim are Sections 338(4) and 339(1) of the California Code of Civil Procedure.

B. Appellant's claim for relief arises under the laws of the State of California, and not under Federal law.

C. The statutes of limitation of the State of California are applicable and should be applied in this action.

D. Sections 338(4) and 339(1) of the California Code of Civil Procedure are the applicable statutes of limitation.

E. Appellant does not assert or show any abuse of discretion by the District Court in its holding of laches and appellant has, therefore, not sustained its burden on this appeal.

F. Appellant's claim for relief was made and repudiated in June, 1947, and its delay of over six years thereafter bars this action.

G. Appellant had actual notice of the patent in suit prior to the middle of 1950, and its failure to assert any claim thereto until January 15, 1954, is barred by laches and the appropriate statutes of limitation.

H. Appellant's claim for relief is barred by its constructive notice of the facts regarding such claim as early as June, 1947, and its delay thereafter in further asserting its claim.

I. There is no actual fraud involved in this action.

J. The record and law amply support the District Court's holding that appellant was guilty of laches.

K. Appellant's attack on C. A. Miketta, Esq. is wholly unwarranted, as he represented only appellant with regard to the subject matter of this action at the time appellant made its original claim to ownership and when such claim was repudiated by Sears and Schrader.

#### IV.

#### THE ARGUMENT.

##### A. The Legal Basis Supporting Dismissal of Appellant's Claim.

The District Court dismissed appellant's claim to ownership of the patent in suit on the ground that appellant was guilty of laches in asserting such claim [R. 54-56]. Equally applicable to bar appellant's claim, we suggest, are either of the statutes of limitation of the State of California set forth in Sections 338(4) (three years) and 339(1) (two years) of the California Code of Civil Procedure.

As found by the District Court [Finding XX, R. 53]. following its requests in May or June, 1947, to Sears and Schrader (the joint inventors of the patent in suit) to assign to it inventions made by them during their employment by it, appellant took no action whatever to claim ownership to such inventions until it appeared in this

action on January 15, 1954, a period of over *six* years. This finding of fact is not challenged by appellant.

Since appellant's delay in pressing its claim for relief is far in excess of the applicable California statutes of limitation, it is immaterial to the result whether it be held that such claim and appellant's action are barred by such statutes of limitation, or one of them, or by laches, as held by the District Court. On either ground the judgment dismissing appellant's action should be affirmed. In the interests of technical legal correctness, however, we hereinafter argue both theories.

### **B. Appellant's Claim for Relief Is Local in Character.**

Appellant's complaint in intervention: alleges that under the conditions of their employment by appellant Sears and Schrader were obligated to assign all patent rights on improvements made by them during such employment to appellant [Par. 11, R. 19]; alleges that the inventions of the patent in suit were such improvements made by them during their employment [Par. 14, R. 20]; alleges that appellant was entitled to an assignment from Sears and Schrader of the patent in suit [Par. 19, R. 23]; alleges that plaintiff Hartley Pen Company, as assignee of the patent in suit, is not a bona fide assignee and holds title thereto as a constructive trustee for the benefit of appellant [Pars. 20, 21, R. 23-24]; and prays for an assignment of the patent in suit [Prayer, Par. B, R. 25]. These allegations are, of course, denied by plaintiff Hartley Pen Company [Answer, R. 28], and whether Sears or Schrader were actually under any obligation to assign to appellant the inventions of the patent in suit

was not passed upon by the District Court and is not an issue here.

It is, therefore, plain that appellant's action is simply to compel an assignment of the patent in suit. The law is clear that such an action involves no Federal Law does not arise under any Act of Congress, and is merely local in character. See: *Pratt v. Paris Gaslight & Coke Co.*, 168 U. S. 225, 42 L. Ed. 458; Walker on Patents, (Deller's Ed. 1937), Section 413. The District Court took jurisdiction on the ground that appellant's claim to ownership of the patent in suit was ancillary to the main cause of action for patent infringement [Finding VI, R. 43], but this does not affect the fact that appellant's claim arises under the laws of the State of California and is simply local in character.

### **C. The California Statutes of Limitation Are Applicable.**

Since, as pointed out above, appellant's claim for relief arises under the laws of the State of California, we submit that the statutes of limitation of the State of California are applicable as a bar to this action by appellant, and should have been held by the District Court to directly bar this action, without any regard to the doctrine of "laches."

The recent decision of the Supreme Court in the case of *Guaranty Trust Co. v. York*, 326 U. S., 99, 65 S. Ct. 1464, 89 L. Ed. 2079 (1945) is determinative of this point, holding that in an equity case for breach of trust brought in the Federal courts, arising under State law, the Federal court was required to apply the State statute of limitations that would govern like suits in the courts of



the State where the Federal court was sitting. To the same effect, See: *Ragan v. Merchants Transfer & Warehouse Co., Inc.*, 337 U. S. 530, 69 S. Ct. 1233, 93 L. Ed. 1520 (1948).

The District Court, here, found as a fact that appellant's claim to ownership of the patent in suit would be barred by applicable State statutes of limitation if brought in the court of the State of California [Finding XXII, R. 53]. This finding of fact is not challenged or mentioned by appellant.

As pointed out by the Supreme Court in the *Guaranty Trust Case, supra* (at p. 109) "for the same transaction the accident of a suit by a non-resident litigant in a Federal court instead of in a State court a block away should not lead to a substantially different result." While that case was based on diversity of citizenship, the same reasoning applies to the present case in which appellant also asserted a choice of forums and selected the Federal court instead of the courts of the State of California only a short block away.

Therefore, we suggest that there was no burden on appellee Hartley Pen Company to show prejudice resulting from the delays of appellant to take action extending beyond the expiration of the statutes of limitation of the State of California, and that appellant's argument with respect to such a showing of prejudice (pp. 45-49) is irrelevant.

We further submit that since this action by appellant would be barred by the applicable statutes of limitation of the State of California if brought in its courts, the action is so barred here as a matter of law and the judgment should be affirmed on that ground without the necessity of considering the detailed facts.

#### D. The Relevant California Statutes of Limitation.

While the District Court found that appellant's action "would be barred by applicable state statutes of limitation, if asserted in the courts of the State of California [R. 54]," the District Court referred only to Section 338(4) of the California Code of Civil Procedure, as follows:

"§338. Within three years. . . .

"4. An action for relief on the ground of fraud or mistake, the cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake."

We suggest, however, that Section 339(1) of the California Code of Civil Procedure is equally, if not more, apposite to the facts of this case. Section 339(1) is as follows:

§339. Within two years:

"1. An action upon a contract, obligation or liability not founded upon an instrument of writing.  
. . . ."

Appellant's claim to ownership of the patent in suit is not based upon any written contract, as conceded by its counsel [R. 81] and as so found as a fact by the District Court [Finding XI, R. 46]. Appellant's claim is based solely upon an alleged implied-in-law obligation of Sears and Schrader to assign to appellant inventions made by them during their employment and arising out of the fact of such employment.

The District Court found that the machine of the patent in suit was in the possession of appellant and commercially used by it to practice its method of use prior to

March, 1947 [Finding XIII, R. 47], and that as early as May or June, 1947, appellant knew that Sears and Schrader had during their employment designed such machine and developed the method [Finding XVII, R. 52]. The District Court further found that if either Sears or Schrader was under any obligation to assign the inventions of the patent in suit to appellant, such obligation matured upon the completion of such inventions and not later than March, 1947 [Finding XIII, R. 47], and further found that appellant's claim to ownership arose at least as early as June 14, 1947 [Finding XVII, R. 52]. These findings are not attacked by appellant.

Since appellant's claim is a simple one on an implied-in-law obligation, it is, we suggest, directly within Section 339(1) *supra*, and, since appellant took no action whatever to assert its claim within the two-year period of Section 339(1), its claim should be held barred thereby and the judgment affirmed on this ground.

#### **E. The District Court Did Not Abuse Its Discretion in Sustaining the Defense of Laches.**

There is not even any assertion in appellant's brief that the District Court abused its discretion in sustaining the defense of laches.

The defense of laches is an equitable defense addressed to the sound discretion of the chancellor.

See:

*Robert Hind, Limited v. Silva*, 75 F. 2d 74, 78 (C. C. A. 9, 1935);

*Gillons v. Shell Co. of California*, 86 F. 2d 600, 607 (C. C. A. 9, 1936);

*Gardner v. Panama R. Co.*, 342 U. S. 29, 96 L. Ed. 31, 72 S. Ct. 12 (1951);

*Potash Co. of America v. International Min. & C. Corp.*, 213 F. 2d 153, 155 (C. A. 10, 1954).

Where a decision is predicated upon the sound discretion of the trial court, there is a heavy burden upon an appellant pressing an appeal to demonstrate convincingly that the chancellor abused his discretion in rendering such decision.

See:

*Fidelity & Deposit Co. of Maryland v. Lindholm*, 66 F. 2d 56, 61 (C. C. A. 9, 1933).

The decision of the trial court should not be set aside unless it is palpably wrong.

See:

*Gillons v. Shell Co. of California*, *supra*;

*The Kermit, Lamborn et al. v. American Ship & Commerce Navigation Corporation et al.*, 76 F. 2d 363 (C. C. A. 9, 1935), cert. den. 296 U. S. 581, 80 L. Ed. 411, 56 S. Ct. 93 (1935).

If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.

See:

*Delno v. Market St. Ry. Co.*, 124 F. 2d 965 (C. C. A. 9, 1942).

Where an appellant fails to point out the errors and where and in what specific respects the chancellor has abused his discretion, the errors should be deemed aban-

done and the appeal should be dismissed as presenting nothing for review.

See:

*United States v. Cushman*, 136 F. 2d 815, 817 (C. C. A. 9, 1943);

*Peck v. Shell Oil Co.*, 142 F. 2d 141 (C. C. A. 9, 1944).

Appellant's brief merely cavils, in raising captious and frivolous objections to some of the secondary evidentiary points. It makes no serious or any attempt to show that the chancellor abused his discretion in sustaining the equitable defense of laches. We suggest that the Judgment should be affirmed on this ground alone.

#### **F. Appellant's Claim Was Repudiated in June, 1947.**

Although appellant's brief fails to state the basis of its claim to title to the patent in suit, its complaint in intervention indicates that the claim is based upon appellant's contention that Sears and Schrader, by the general terms of their employment by appellant, were obligated to assign to appellant all patent rights in improvements made by them during their employment and relating to ball point pens, parts therefor, and improved methods and machines for manufacturing such pens [Compl. Par. 11, R. 19]. As found by the District Court, appellant's claim is not based on any written contract [Finding XI, R. 46]. Appellant's complaint alleges in effect that Sears and Schrader held, and plaintiff Hartley Pen Company now holds, the inventions of the patent in suit and the patent as "constructive trustees' for the benefit of appellant.

If there was any obligation on Sears and Schrader to assign inventions to appellant, such obligation matured

when the machine and method of the patent in suit were reduced by appellant, at least as early as March, 1947, as so found by the District Court [Finding XIII, R. 47]. Again, the District Court found as a fact that appellant's claim to such inventions arose at least as early as June 14, 1947 [Finding XVII, R. 52]. These findings of fact are not challenged by appellant, and any discussion thereof is carefully avoided in appellant's brief.

The District Court further found as a fact that in May or June, 1947, Sears and Schrader repudiated "any obligation that they might have had to assign to the intervener inventions made by them during their employment by it" [Finding XV, R. 50]. This important finding of fact is fully supported by the evidence and the other uncontroverted findings of fact, which are reviewed as follows:

The District Court found [Finding XV, R. 49] that early in June, 1947, Mr. Miketta *acting as an agent for appellant and with its authorization* requested Sears and Schrader to execute written agreements to assign to appellant inventions made by them during the course of their employment. This is not denied by appellant. The District Court further found [Finding XV, R. 49] that one such form of assignment agreement which Sears was at that time so requested to execute was in the form exemplified by Exhibit B [R. 178] which required Sears to agree to assign to appellant:

" . . . the full and entire right, title, and interest in and to any patentably inventions [*sic*] invented by Hartley M. Sears during the course of his employment by Kimberly Corporation and prior to May 1, 1947, and embodied in the mechanical constructions of ball pens or parts therefor manufactured and sold by Kimberly Corporation prior to May 1, 1947, and

*embodied in apparatus or mechanical devices used by Kimberly Corporation prior to May 1, 1947, in the manufacture of ball pens or parts therefor.”* (Emphasis added.)

The District Court also found [Finding XV, R. 49] as a fact that a similar document was presented to Schrader for his signature, and that both Sears and Schrader refused to execute such agreements and *this fact was known to appellant prior to June 5, 1947*, and this is not denied or challenged by appellant.

As early as May 17, 1947, appellant knew that at least Sears was refusing to assign inventions made by him during his employment. Under an agreement with Eversharp, Inc., dated May 17, 1947 [Ex. 5] the principal shareholders of appellant agreed to assign past inventions to Eversharp, but Sears was expressly omitted from such obligation to assign past inventions, at the suggestion of Mr. Taube, executive vice-president of appellant, who candidly admitted [R. 153]:

“A. The reason for the omission of Mr. Sears is, the name of Mr. Sears, as I recall it, is that *I suggested that he be not included in it*, because in my mind the question of the assignment of *past* and future inventions was a package deal. I don’t know if I was wrong, but that is the way I understood it, and *I was under the impression that Sears was going to refuse it*. I was, of course, extremely anxious to bring the option deal to a successful conclusion, and, therefore, *I myself suggested that his name be omitted.*” (Emphasis added.)

The District Court found [Finding XV, R. 50-51], that *in lieu* of such assignments, appellant’s attorney acting on its behalf, prepared and submitted to Sears and Schrader

the documents Exhibits C [R. 180] and D [181], which in effect granted to appellant a mere shop right as to inventions made by them during their employment by appellant, and found that these documents were delivered to general counsel for appellant on or about June 11, 1947. Furthermore, in the Option Agreement dated June 14, 1947 [R. 176], Sears was expressly excluded from the obligation of most of the other shareholders of appellant to assign inventions acquired by them within one year theretofore.

The District Court found as a fact [Finding XV, R. 50], that Sears refused to assign such inventions to appellant upon the stated ground "that he was not obligated to do so under the terms of his employment by intervener, and this was known to intervener prior to June 5, 1947." This finding is amply supported by the testimony of both Mr. Miketta [R. 134-135, 200] and Mr. Sears [R. 195-196].

To recapitulate, here we have a demand by appellant to Sears and Schrader as early as June, 1947, that they assign to it inventions made by them during their employment by it, and a flat refusal by them to do so. This was a complete repudiation by them in June, 1947, of the claim asserted by appellant here.

The repudiation by a trustee of his trust obligations commences the running of the appropriate statutes of limitation against the beneficiary of the trust to enforce the trust (See: 25 Cal. Jur., Trusts, Sec. 133). In the case of a constructive trust, such as is asserted here by appellant, no such repudiation is necessary to start the running of the statutes of limitation (See: 25 Cal. Jur., Trusts, Sec. 135).



We, therefore, submit that whether Section 339(1) [two years] or Section 338(4) [three years] of the California Code of Civil Procedure, or the doctrine of laches, is applied here the result is the same, as appellant waited more than *six* years after its claim was repudiated by Sears and Schrader before taking legal action to assert its claim, and the action is barred. This fully supports the Judgment dismissing appellant's action.

#### **G. Appellant's Claim Is Barred by Its Early Actual Notice of the Patent in Suit.**

The District Court found that:

"Prior to the middle of 1950 intervener received direct and actual notice of the issuance and contents of United States Letters Patent No. 2,498,009 in suit [F. XIX, R. 53.]"

Appellant's specification of errors (pp. 9-10) does not challenge this finding of fact or allege it to be erroneous, nor is this point argued in appellant's brief. Appellant has, therefore, waived any possible objection to this finding of fact.

See:

*Mason v. Anderson-Cottonwood Irrigation District*,  
126 F. 2d 921 (C. C. A. 9th, 1942).

In any event, there is ample evidence to support such finding. The witness Croan testified that prior to June 30, 1950, he saw and examined a copy of the patent in suit at the executive offices of appellant, and that it was openly available for inspection by him and the officers of appellant Kimberly Corporation [R. 191]. On cross-examination by appellant in open court, Croan further testified that this copy of the patent in suit was at that

time shown to him by Mr. Taube (executive vice-president of appellant) [R. 88-90].

Mr. C. A. Miketta, a member of the Bar of this Court testified that in the spring of 1951 he personally advised Mr. Taube at the plant of the Kimberly Corporation that the Sears-Schrader machine of the patent in suit had been patented by them [R. 236-237, 249]. Again, in November, 1952, Mr. Miketta in a conversation with Mr. Taube referred to the patent here in suit [204-205, 239].

The evidence supports the District Court's Finding of Fact XIX as to actual notice, the District Court had the opportunity to judge the credibility of the witnesses who both appeared and testified in open court, and appellant has not shown this finding to be clearly erroneous. Therefore, Finding XIX should not be set aside (Rule 52(a) of the Federal Rules of Civil Procedure).

Obviously, Finding XIX supports the judgment. Since appellant took no legal action in the premises until it filed its Motion to Intervene in this action on January 15, 1954, it is plain that it had ample actual notice of the issuance of the patent in suit more than *three* years prior thereto to support the application of the bar of Section 338(4) of the California Code of Civil Procedure or more than *two* years prior thereto to support the application of the bar of Section 339(1) thereof. Appellant's delay beyond the expiration of either period specified by such statutes of limitation also constitutes laches, fully supporting the judgment.

#### **H. Appellant's Claim Is Barred by Its Early Constructive Notice.**

The District Court found [Finding XVII, R. 51-52] that appellant had constructive notice at least as early as June 14, 1947, that the inventions of the patent in suit were in fact patentable by reason of the facts that: (a) Sears and Schrader refused to assign to appellant inventions made by them during their employment; (b) as early as May or June, 1947, appellant knew that Sears and Schrader during their employment had designed the machine and developed the method of the patent in suit; (c) such circumstances were sufficient to put a prudent man on inquiry as to the facts; and (d) appellant had no right to rely upon any statements allegedly made by either Sears or Schrader as to such patentability. In addition, of course, prior to May 1, 1947, appellant, by Taube's alleged discussion with Sears as to the possible patentability of such machine and method, recognized that there was a question as to such patentability. In finding such constructive notice, the District Court did not ascribe it to any private knowledge of Mr. Miketta, but to actual facts known to appellant, and the argument by appellant's brief as to Mr. Miketta being a conduit for constructive notice [pp. 13-18] is wholly irrelevant.

The District Court also found as a fact that appellant had constructive notice of the patent in suit by reason of the recordation on November 12, 1949, in the United States Patent Office of written assignment thereof by Sears and Schrader to plaintiff Hartley Pen Company, and by reason of the issuance of the patent No. 2,498,009 in

suit on February 21, 1950, as of each of such dates [Finding XVIII, R. 52].

The law is that the "issuance of a patent and recordation in the Patent Office constitutes notice to the world of its existence."

See:

*Wine Railway Appliance Co. v. Enterprise Railway Equipment Co.*, 297 U. S. 387, 393, 56 S. Ct. 528, 80 L. Ed. 736;

*Sontag Stoves Co. v. National Nut Co.*, 310 U. S. 281, 285, 60 S. Ct. 96, 84 L. Ed. 1204.

Particularly apposite to the facts in this case is *Teal v. Schrader*, 158 U. S. 152, 15 S. Ct. 772, 39 L. Ed. 938. That case was an action in equity arising in California to compel the transfer of certain lands upon the ground that the legal owner had fraudulently acquired title thereto. The Supreme Court held that recordation of the deeds to the land was constructive notice to the plaintiffs of the fact of such conveyance, and that the action was barred by Section 338(4) of the California Code of Civil Procedure. For many other cases holding that public records operate as notice of facts starting the running of the statutes of limitation against actions based on alleged fraud, see the note in 137 American Law Reports, annotated, pages 268-301.

Appellant's brief does not deny that the issuance of a patent is constructive notice thereof to the world. It merely attempts to avoid the fatal consequences of such constructive notice by arguing that there is no duty upon a defrauded party to search the public records where there is a confidential relationship between the parties [pp.

18-25]. The complete answer to this is severalfold as follows:

(a) Any confidential relationship between Sears and Schrader and appellant arising out of their employment by the latter ended on May 1, 1947, with the termination of their employment;

(b) Appellant was under a duty to investigate the Patent Office records as early as the middle of 1950, as it had actual notice of the patent in suit prior to that time, as the District Court so found [Finding XIX, R. 53], and was further advised of the issuance of such patent by Mr. Miketta as early as May, 1951 [R. 236-237, 249];

(c) There was in fact no fraud involved, as pointed out hereinafter.

The cases relied upon by appellant [pp. 19-25] are all readily distinguishable on their facts from the present situation and are not in point. In *Anderson v. Thacher*, 76 Cal. App. 2d 50, the misrepresentations relied upon were intentional, whereas there is no evidence whatever that there was an intentional misrepresentation in the present case and even the fact of such a misrepresentation is denied. In *Dabney v. Philleo*, 38 Cal. 2d 60, and in *Rutherford v. Rideout Bank*, 11 Cal. 2d 479, and in *Hobart v. Hobart Estate Co.*, 26 Cal. 2d 412, there were no circumstances putting the plaintiff upon inquiry, whereas in the present case appellant had actual notice of the issuance of the patent in suit more than three years prior to its action here. In *Anglo-California National Bank v. Lazard*, 106 F. 2d 693, the confidential relationship between the parties continued within three years of the bringing of suit, whereas in the present case any alleged confidential relationship (the fact of which is denied)

ended on May 1, 1947, more than *six* years prior to appellant's action herein.

We, therefore, submit that the recording of the written assignment of the patent in suit on November 12, 1949, and the issuance of the patent on February 21, 1950, were constructive notice of the facts thereof more than three years prior to appellant's entry in this action, and appellant's claim is barred by either Section 338(4) or Section 339(1) of the California Code of Civil Procedure, or by laches.

### **I. There Is No Actual Fraud Involved in This Action.**

Although appellant's brief repeatedly refers to "fraud" it wholly fails to specify the nature of such alleged fraud. We, like the Court, must guess as to just what appellant contends is the alleged "fraud" referred to by it in its brief. Appellant's brief (p. 4) states in effect that appellant relied "on the fraudulent representations of said Sears," but the only representation by Sears referred to in appellant's brief is (p. 3) that "Sears falsely represented to intervener-appellant that the machine protected by the patent in suit did not include any patentable features." The making of this statement was flatly denied by Sears [R. 194]. It is to be noted that appellant does not charge the co-inventor Schrader with any misrepresentations of any kind, and none is referred to in the record.

That a mere expression of opinion by a layman as to the possible patentability of an invention cannot be the basis for an action for fraud is, we suggest, self-evident. The patentability of an invention is a mere uninformed prediction as to a possible future event, and is subject to the unpredictable vagaries of the Patent Office. We must con-

fess that a statement as to possible patentability even by patent counsel is far from infallible.

The law is clear that statements of legal opinion by a layman cannot normally be the basis for an action for fraud where the facts are equally known or accessible to both parties (See: 23 Am. Jur. 810; 23 Cal. Jur. 2d 45). Such general rule is particularly apposite here, where, at the risk of repetition, the facts were as follows:

Sears and Schrader made the invention of the patent in suit while employed by appellant, and a machine according to the patent was built and commercially operated by appellant as early as March, 1947, with its full knowledge, as found by the District Court [Finding XIV, R. 48] and admitted by appellant [Compl. Par. 14, R. 20]. At that time appellant knew that Sears and Schrader had designed and developed such machine and method during such employment, as so found by the District Court [Finding XVII, R. 52]. Prior to May, 1947, appellant appreciated that such machine and method might be patentable, as found by the District Court [Finding XIV, R. 45] and as admitted by appellant [Compl. Par. 16, R. 21]. At all times during the employment of Sears and Schrader and thereafter, appellant was represented by patent counsel, C. A. Miketta, Esq. (a member of the Bar of this Court), but at no time did appellant make any inquiry of Mr. Miketta or any other patent counsel as to the patentability of the machine and method of the patent in suit, although such an opinion as to patentability by patent counsel was as available to it as to either Sears or Schrader, as the District Court so found [Finding XIV, R. 48]. Sears did not consult patent counsel with regard to the patentability of the invention until June 8-10, 1947 [R. 99-100, 110-111, 203, 211], long after he had allegedly made such

representation to appellant. Such facts are not controverted by appellant.

As found by the District Court [Finding XIV, R. 48], appellant was not justified nor had it any right to rely upon any personal opinion of Sears with respect to such patentability if in fact inquiry was made of Sears, as early as May, 1947, appellant had a duty to make an independent investigation as to such patentability, and appellant was negligent in failing to make such investigation.

Appellant did not rely upon such alleged representation by Sears, because in May, or early June, 1947, it requested both Sears and Schrader to assign to its inventions made by them or machines used by it during their employment, which, of course, included the machine of the patent in suit. Such request by appellant is wholly inconsistent with any alleged reliance upon Sears' alleged representations. Under the law, there can be no charge of "fraud" by appellant as to such representations when it obviously did not rely upon them.

See:

23 Am. Jur., Fraud and Deceit, Sec. 141;

23 Cal. Jur. 2d Fraud and Deceit, Sec. 29;

*Seeger v. Odell*, 18 Cal. 2d 475, 115 P. 2d 977,  
136 A. L. R. 1291.

## **J. The Existence of Laches Is Amply Supported by the Record.**

As pointed out above, appellant had actual notice of the adverse position taken by Sears and Schrader as early as June, 1947, and of their repudiation of any obligation to assign inventions to appellant, yet appellant delayed over six years to assert any further legal claim to such inven-



tions. All of the facts in this case clearly show the gross negligence of appellant in pursuing its alleged claim to such inventions including the one of the patent in suit.

The existence of laches is a question primarily addressed to the discretion of the trial court and need not be determined merely by a reference to a mechanical application of the statutes of limitation. Courts of equity, however, usually act or refuse to act in analogy to such statutes of limitation.

See:

*Gillons v. Shell Co. of California*, 86 F. 2d 600, 607 (C. C. A. 9, 1936), cert. den. 302 U. S. 689, 82 L. Ed. 532, 58 S. Ct. 9 (1937);

*Craftint Mfg. Co. v. Baker*, 94 F. 2d 369 (C. C. A. 9, 1938);

*Westfall Larson & Co. v. Allman-Hubble Tug Boat Co.*, 73 F. 2d 200 (C. C. A. 9, 1934).

Since the law of the State of California applies, we find no necessity for showing any prejudice to the appellee to sustain its defense of laches. The delay being greater than the analogous statutes of limitation, the prejudice and injury are presumed and the burden is shifted to the appellant to show the contrary. See:

*Gillons v. Shell Co. of California*, *supra*;

*Westfall Larson & Co. v. Allman-Hubble Tug Boat Co.*, *supra*;

*California Casualty Indemnity Exch. v. United States*, 74 Fed. Supp. 408, 410 (D. C., S. D., Cal. 1947);

*Morales v. Moore-McCormack Lines*, 208 F. 2d 218 (C. C. A. 5, 1953);

*McGrath v. Panama R. Co.*, 298 Fed. 303 (C. C. A. 5, 1924).

Notwithstanding the presumption of prejudice aforementioned, the record discloses facts sufficient to establish the prejudice urged by the appellant to be absent herein.

Long prior to the issuance of the patent in suit in February of 1950, and continuously since its issuance, the appellee has operated in accordance with the invention thereof. Further, the appellee has licensed others under the patent [R. 25, 34]. In addition, it is recognized that the ball point pen industry is highly competitive and, as such, the possession by one firm of a small technical advantage over the others, for example by ownership of a patent, is the narrow line of demarcation between survival and bankruptcy. We can observe nothing less than extensive prejudice to the appellee if the patent in suit is taken from it, notwithstanding the violent repercussions that undoubtedly would occur to the present license relationships between appellee and its licensees under the patent in suit.

The above prejudicial aspects are also supplemented by other persuasive factors, for example: the heavy investment made by appellee over a long period of time prior to appellant's claim; the unfortunate prospect of being required to stop using the expensive precision machinery which practices the method of the patent in suit; the unavailability, by death or otherwise, of persons who could have testified in respect to material facts and circumstances relating to the material matters in the case; the disposition or loss of vital documents and records which may have a bearing on the case.

We submit that on the law and on the facts appellant is guilty of gross laches such as to bar its stale claim in this action, and that the Judgment should be affirmed.

**K. Appellant's Attack on C. A. Miketta, Esq. Is Wholly Unwarranted.**

Appellant's Brief throughout, by inference and innuendo, makes a wholly unwarranted attack on the professional integrity of C. A. Miketta, Esq., a member of the Bar of this Court. While we have no duty to Mr. Miketta, justice and fair play require a brief answer to appellant's charges with regard to Mr. Miketta's alleged "dual role representation" (App. Br. pp. 11, 13-14).

Appellant's argument as to "constructive notice" to appellant through Mr. Miketta is entirely irrelevant, because the District Court did not ascribe any constructive notice to appellant by way of any secret knowledge possessed by Mr. Miketta.

Throughout the negotiations in May and June, 1947, between appellant and Sears and Schrader regarding the assignment by the latter to appellant of inventions made during their employment, Mr. Miketta represented appellant as its patent counsel. As early as June 5, 1947, Sears and Schrader repudiated any alleged obligation to assign such inventions to appellant and this was fully known to appellant as found by the District Court [Finding XV, R. 49-50]. It was not until at least June 9, 1947, that Sears and Schrader consulted Mr. Miketta with regard to patenting the invention of the patent in suit, and up to that time Mr. Miketta had never heard of such invention [R. 110]. There is no contention by appellant that prior to June 9, 1947, Mr. Miketta had represented either Sears or Schrader in any way with respect to anything in which appellant had any interest, and there is no evidence to support such a contention. Consequently, Mr. Miketta had no "dual" representation during the critical events occurring prior to June 9, 1947, and when

Sears and Schrader consulted him on that date he was as free to prepare and file a patent application for them as any strange patent counsel would have been. His preparation and filing of the patent application for the patent in suit did not and could not prejudice appellant in any way. Actually, the filing of such patent application preserved the rights in the inventions of the patent in suit, whether for Sears and Schrader or for appellant in the event appellant later decided to legally renew its earlier claim to ownership of inventions made by them during their employment. Appellant's Brief (p. 16) concedes that Mr. Miketta was under no obligation to disclose to appellant the fact that Sears and Schrader had filed such patent application.

We, therefore, suggest that Mr. Miketta acted in the best tradition of the Bar, and that appellant's innuendoes to the contrary are unsupported and wholly unjustified.

## V. CONCLUSION.

The real explanation for appellant's delay in asserting any claim to ownership of the inventions of the patent in suit is, we suggest, very plain from the record. In May, 1947, appellant's shareholders made a deal with Eversharp, Inc. to sell the latter all their stock in appellant for a substantial consideration. Consequently, we suggest, at that time it made no difference to appellant whether Sears and Schrader assigned to it their inventions, so long as Eversharp was satisfied. Mr. Taube, in effect, admitted this [R. 150]. At that time neither appellant nor its shareholders had any real interest in the matter. It was not until over six years later, after the Eversharp sale had fallen through, and after appellant had discovered that the patent in suit had become valuable, that appellant

renewed its stale claim, first made in May or June, 1947, and entered this pending action.

This case presents the simple situation of the employer, appellant Kimberly Corporation, upon the termination on May 1, 1947, of the employment of its two employees Sears and Schrader, requesting the employees to assign to it all inventions made by them during their employment, and, upon a refusal by them to do so, accepting the grant of a more limited shop right in the inventions, and then waiting until January 15, 1954, a period of almost seven years, before renewing its claim to ownership of such inventions. These basic facts are not and cannot be controverted by appellant. Appellant's action here is clearly barred by the appropriate statute of limitations of the State of California or by appellant's gross laches for a period far in excess of the periods provided for by such statute.

We submit that the judgment should be affirmed, with costs to the appellee.

Dated: September 2, 1955.

Respectfully submitted,

HARRIS, KIECH, FOSTER & HARRIS,  
FORD HARRIS, JR.,  
DONALD C. RUSSELL,

*Attorneys for Appellee Hartley Pen Company.*



No. 14701.

IN THE

**United States Court of Appeals**  
FOR THE NINTH CIRCUIT

---

KIMBERLY CORPORATION, a corporation,

*Appellant,*

*vs.*

HARTLEY PEN COMPANY, a corporation, LINDY PEN Co.,  
Inc., a corporation, and SIDNEY LINDEN, individually  
and doing business as ADAMS-LINDEN Co.,

*Appellees.*

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Appeal From the United States District Court for the  
Southern District of California, Central Division.

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**REPLY BRIEF OF INTERVENER-APPELLANT  
KIMBERLY CORPORATION.**

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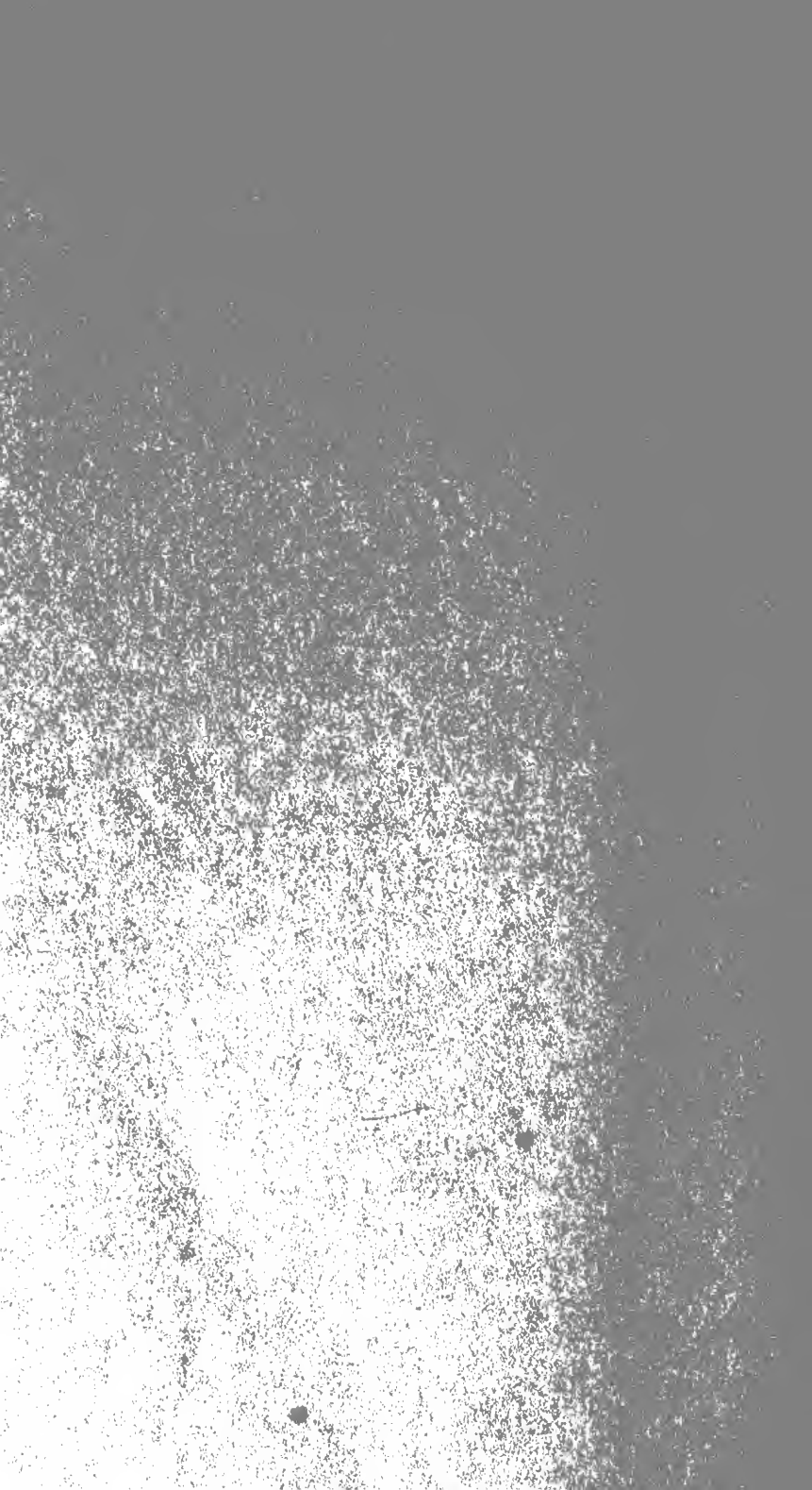
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**FILED**

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**SEP 13 1955**

**PAUL P. O'BRIEN, CLERK**





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No. 14701.

IN THE

# United States Court of Appeals

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KIMBERLY CORPORATION, a corporation,

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and doing business as ADAMS-LINDEN Co.,

*Appellees.*

---

Appeal From the United States District Court for the  
Southern District of California, Central Division.

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## REPLY BRIEF OF INTERVENER-APPELLANT KIMBERLY CORPORATION.

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Intervener-appellant will answer appellee's brief in the order in which the matters are set forth therein. In the interest of clarity, this brief will be addressed to appellee's arguments under the headings as they are identified in its brief.

### Appellee's Introduction.

In its introduction appellee states that intervener-appellant's opening brief does not comply with Rule 18(d) of this Court because of its alleged failure to state "as particularly as may be wherein the findings of fact and conclusions of law are alleged to be erroneous."

Rule 18(d) does not require that the Findings of Fact be identified by number. The Findings of Fact which intervenor-appellant challenges were fully and thoroughly identified in the Specification of Errors. In some instances the Specification of Errors asserted that no findings were made which intervenor-appellant believes should have been made; hence, there was no finding to identify.

## **APPELLEE'S STATEMENT OF THE CASE.**

### **Subheading "A."**

We should like to point out that neither plaintiff's Motion to Dismiss, intervenor-appellant's Complaint, nor its Motion for Summary Judgment referred to on page 3 in appellee's brief are part of the record on appeal in this case. In plaintiff's Answer to Intervener's First Amended Complaint there appears the allegation [R. 38] that the claim of intervenor-appellant is barred by statutes of limitations of the State of California. Other than this general reference, no particular Statutes of Limitations are identified.

### **Subheading "B."**

Appellee fails to recognize that the only issue in this case is whether intervenor-appellant's claim is barred by laches. As we shall hereinafter point out, the Statutes of Limitations are applicable in equity cases only by analogy and are not necessarily determinative of the issue of laches.

### **Subheading "C."**

Under this subheading entitled "The Facts" the appellee summarizes the findings of the trial court supplemented by comments. Since these findings include those that are challenged on this appeal, their reiteration at this place is unimportant. It is not necessary at this point to discuss the extraneous comments made by appellee, the pertinent issues are treated in this brief hereinafter.

## APPELLEE'S ARGUMENT.

### Subheading "A."

In answer to subdivision "A" of appellee's Point IV, we wish to state that intervener-appellant, of course, does not challenge the fact that it did not file its action until January 15, 1954 since it was not until December of 1953 that it learned of the facts upon which its claim is based.

Appellee again erroneously asserts that the California Statutes of Limitations would have barred intervener-appellant's claim in any event. As we have heretofore and shall hereafter note, the Statutes of Limitations are not controlling in an equity case involving the issue of laches. Furthermore, even if the California Statutes of Limitations were applicable, we must point out that since intervener-appellant's action is based upon fraud, the running of the statute would not have commenced until the "discovery" of the fraud which intervener-appellant alleges did not occur until December of 1953.

### Subheading "B."

Since this appeal presents no challenge to the jurisdiction of the Federal District Court, we see no point in the argument set forth under this subheading "B."

### Subheadings "C," "D" and "J."

Appellee, recognizing the precarious position in which it finds itself by reason of not having met its burden in showing that appellee Hartley Pen Company was prejudiced by reason of the purported delay of intervener-appellant in instituting its action, now seeks refuge in an attack upon the judgment in its favor. Appellee, under subheading "C," now contends that the District Court should have decided the case not on the basis of laches, but on the basis of the applicable Statutes of Limitations

of the State of California. Had the District Court decided the case on the basis of the applicability of the California Statutes of Limitations, argues appellee, then it would not have been compelled to meet the burden of showing prejudice to it by the bringing of intervenor-appellant's action, which, of course, it has utterly failed to do.

The following discussion on this matter of prejudice is applicable not only to appellee's subheading "C," but as well to subheading "J," page 28 *et seq.* Subheading "J" asserts that the existence of laches is supported by the record.

The California law bears out intervenor-appellant's assertion that absent any showing of prejudice, the defense of laches in an equity case cannot prevail. The California Statutes of Limitations are not controlling in this regard. In support of this assertion, intervenor-appellant in its opening brief has referred to controlling cases on this point. Especially is a showing of prejudice required where the action is based on fraud.

*Sidebotham v. Robison*, 216 F. 2d 816, decided by this Honorable Court was based on fraud. This Honorable Court therein pointed out that it applied the law of the State of California (p. 823). This case holds that in addition to mere lapse of time, it is necessary to show prejudice resulting from the delay (p. 827). This Honorable Court cited *Field et al. v. Bank of America Nat. Trust & Savings Association*, 100 Cal. App. 2d 311, 223 P. 2d 514. That California decision, as well as many others, hold that in passing upon the defense of laches, regard will be had to circumstances which justify the delay, to the nature of the case and the relief demanded, and to the question whether the rights of the defendant, or of other persons, have been prejudiced by such delay. This California case also was found on *fraud*, and is similar to the situation found herein.

That this Honorable Court stated the established rule in *Sidebotham v. Robison*, *supra*, in deciding that prejudice must be shown in order to justify the defense of laches. Attention is respectfully again directed to *In re Harootenian's Estate*, 38 Cal. 2d 242, discussed on page 47 of intervener-appellant's opening brief.

The laws of the State of California fully substantiate the position of intervener-appellant that *prejudice must be shown* to substantiate the defense of laches.

Of further interest is *Holmberg, et al. v. Armbrecht, et al.*, 327 U. S. 392, 66 S. Ct. 582. This case reasserts that the law of the *state* controls; and from the foregoing it is amply clear that the California law bears out intervener-appellant's contentions.

In discussing generally such a defense, and especially a case founded upon fraud, the Court, in *Holmberg, et al. v. Armbrecht, et al.*, at page 396, states:

"Equity eschews mechanical rules; it depends on flexibility. *Equity has acted on the principle that 'laches is not, like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced,—an inequity founded upon some change in the condition or relations of the property or the parties.'* \* \* \* And so, a suit in equity may lie though a comparable cause of action at law would be barred. If want of due diligence by the plaintiff may make it unfair to pursue the defendant, fraudulent conduct on the part of the defendant may have prevented the plaintiff from being diligent and may make it unfair to bar appeal to equity because of mere lapse of time.

"Equity will not lend itself to such fraud and historically has relieved from it. It bars a defendant from setting up such a fraudulent defense, as it interposes against other forms of fraud. And so this

Court long ago adopted as its own the old chancery rule that where a plaintiff has been injured by fraud and 'remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party.'” (Italics ours.)

Although there is no doubt that the burden is upon appellee to show prejudice due to delay, the fact that appellee assumed the burden of proof at the trial precludes it from now urging this point. See *Pacific Portland Cement Co. v. Food Machinery & Chemical Corporation*, 178 F. 2d 541 (C. A. 9), particularly page 547.

Failure on the part of the plaintiff-appellee to introduce any evidence whatever on the question of prejudice is fatal to its defense of laches, as shown by the latest controlling decisions applying California law to cases involving fraud. There is a satisfactory showing in this record why the discovery of the fraud did not occur until December, 1953.

Appellee on page 30 of its brief again recognizing the fact that it has failed to meet the burden of showing that it has been prejudiced by passage of time involved in the assertion of intervener-appellant's claim, and in utter disregard for the established rules of practice on appeal, goes on an excursion completely out of the record in an attempt to bring before this Honorable Court conjectures as to how appellee may have been prejudiced. We submit that there is no support in the record for the matters set forth on this page of appellee's answering brief.



### Subheading “E.”

In its opening brief, intervenor-appellant has set forth fully the reasons for its contentions that the findings of the lower court are clearly erroneous on view of the evidence upon which they must rest for their support, thus requiring a reversal of the trial court’s judgment under Rule 52(a) of the Federal Rules of Civil Procedure. No purpose would be served by repeating these arguments at this point.

### Subheading “F.”

Appellee’s argument under this heading “F” is devoted principally to references to the findings made by the court. No one, of course, denies that certain findings were made. The question before this Court is whether the findings of the court and the judgment entered thereon are not clearly erroneous in the light of the “entire evidence” adduced in the case. Notwithstanding appellee’s statement to the contrary, the record is clear that intervenor-appellant has interposed effective challenges to all of the material findings made by the trial court.

At the middle of page 19 of appellee’s brief certain testimony of Mr. Taube has been taken out of context with selective emphasis and with the usual distortions resulting from that process. Mr. Taube in his deposition and in his testimony at the trial made it very clear that he did not feel that Sears and Schrader should be obligated to assign *future* inventions conceived by them particularly since they were entering into a new and competitive business. But as to any *past* inventions, he relied upon the assurance from Sears that steps had been taken to patent all such inventions as were patentable [R. 150,

255, 260, 264]. In Mr. Taube's testimony set forth at page 19 of appellee's brief, Mr. Taube merely points out that since the form of assignment purportedly presented to Sears and Schrader covered both *past and future* inventions, he could readily understand why Sears and Schrader would refuse to sign it in that form. This testimony taken out of context is presented to this Court as evidence of the fact that intervener-appellant as early as May of 1947 knew that Sears and Schrader were *unqualifiedly* refusing to assign inventions made by them during their employment, impliedly on the basis that they were not obliged to do so. Mr. Taube and all the other representatives of intervener-appellant have consistently and emphatically denied that at any time were they informed or did they know that Sears and Schrader were refusing to assign patent rights relating to inventions *therefore* conceived while in intervener-appellant's employ upon the basis that they were not obligated to do so.

### Subheading "G."

The arguments made by appellee under its Point "G" is utterly incredible in the face of the record in this case. Appellee asserts that intervener-appellant has not challenged Finding XIX [R. 53] of the trial court relating to the purported receipt of direct and actual notice of the issuance and contents of United States Letters Patent No. 2,498,009. We respectfully, although we believe needlessly, refer this Honorable Court to intervener-appellant's opening brief at pages 24 and 34 where Finding XIX and the testimony of Sears and Croan relating thereto are subjected to very vigorous challenge indeed.

### Subheading "H."

On page 24 of appellee's brief and as a part of its argument under subheading "H," appellee cites several cases in support of its assertion that intervener-appellant had constructive notice of the issuance of the patent and the pendency of the application.

In *Wine Ry. Appliance Co. v. Enterprise Ry. Equip. Co.*, 297 U. S. 387 the infringer of a patent attempted to avoid an accounting on the basis that it was not given notice of the issuance of the patent by the patentee. The Supreme Court held it is sufficient that the patent issued, and therefore the infringer was liable for infringing acts even before it obtained actual notice of the issuance of the patent. Obviously this case has nothing to do with a duty to investigate public records in order to discover a fraud.

Such a constructive notice by issuance of a patent is *unavailable* against an *infringer*, if the owner of a patent is actually manufacturing under the patent. In that event, the provisions of Section 287 of Title 35, United States Code, are pertinent. This section includes:

" . . . no damages shall be recovered by the patentee in any action for infringement, except on proof that the infringer was notified of the infringement and continued to infringe thereafter, in which event damages may be recovered only from infringement occurring after such notice."

Thus, the United States Code itself shows that the public patent records may not be constructive notice *even against an infringer*. If public patent records are not constructive notice against a person for whose benefit

the public records are *primarily* made, obviously they are not at all constructive notice to a *defrauded* party, since public records of patents are not even remotely designed to inform defrauded persons.

In *Sontag Chain Stores Co. v. National Nut Co.*, 310 U. S. 281, the patent sued upon was a *reissue* patent. A defense often urged against such reissued patents is that of "intervening rights," where the defendant had begun manufacturing an article *after* the original patent issued, but *before* it was reissued. The doctrine is applicable where the article infringes the reissued patent, but *not* the original patent. Such a defense of "intervening rights" was made in the *Sontag* case. The Supreme Court decided that this specific defense could be made good even if the infringer did not know of the issuance of the original patent.

Accordingly, the matter of constructive notice by the issuance of the patent is hemmed in, narrowed and restricted by these decisions. And it is clear from these decisions that sometimes (and only sometimes) the issuance of a patent is constructive notice; and at other times, it definitely is *not*, as in this case. It is abundantly clear that the effect of public records as "notice to the world" or "constructive notice" is dependent upon the circumstances; in fraud actions with the factual situation here involved, there is no constructive notice since there is no duty to investigate these records.

The plaintiff-appellee also asserts that the recording of the assignment of the *application* on November 12, 1949 (prior to the issuance of the patent) is constructive notice, and would therefore start the running of the

statute. The same cases discussed hereinabove regarding public records are in point. There was no *duty* here to search the public records; and furthermore since the perpetrators of the fraud were in a position of trust and confidence, the party defrauded did not have to pursue such avenues of knowledge.

But aside from this, the position of plaintiff-appellee is untenable for still another reason, now to be discussed.

Plaintiff-appellee relies heavily upon *Teall v. Schroder*, 158 U. S. 172. In that case Teall's heirs brought suit against a large number of *bona fide* purchasers, in an effort to obtain a decree to have real property reconveyed to them, thirty-four years after Teall had died. Any recordable deed or conveyance involving such real property includes a definite, complete, and exact delineation and description of the property.

The heirs stated in their complaint that the attorney in fact of Teall had fraudulently laid claim to the property, and had transferred title to the present owners or to the predecessors of the present owners. It was obviously the *duty* of the heirs to investigate title of all the property held by Teall, and public records on file would disclose the *exact* property conveyed by the instrument.

The assignment of a patent *application* does *not* include a description of the invention; the application is merely identified by serial number and filing date or equivalent data. No inkling is available from a search or examination of these records as to the *identity or scope* of the invention claimed in the application. Note Rule 331 of the Rules of Practice of the United States Patent Office, which asserts that in order to be recordable, the instru-

ment relating to an application should identify the application by serial number and filing date. The name of the inventor and title of the invention as stated in the application should also be given. Furthermore, this record is silent as to the contents of the assignment.

The assignment from Schrader and Sears to Hartley Pen Company qualifies under this Patent Office rule, but it ordinarily would not, as in recorded conveyance of real property, give any description of the invention itself. In fact, the rules of the Patent Office preclude access to the application files; and such rules have been effective for many years. Present Rule 14(a) reads as follows:

“Pending applications are preserved in secrecy. No information will be given by the Office respecting the filing by any particular person of an application for a patent, the pendency of any particular case before it, or the subject matter of any particular application, nor will access be given to or copies furnished of any pending application or papers relating thereto, without written authority of the applicant, or his assignees or attorney or agent, unless it shall be necessary to the proper conduct of business before the Office or as provided by these rules.”

The availability of the assignment recorded on November 12, 1949, of the *pending* application of Sears and Schrader is sterile and valueless to determine what, in fact, was the invention described and claimed in that application. Accordingly, *Teall v. Schroder* at best stands for the proposition that when, and only when, upon inspection of a public record of conveyances, *the fraud is actually discovered with respect to that property*, notice is imputed to the interested parties.

There is a further important distinction between *Teall v. Schroder* and the present case. While Teall or Teall's heirs did not actually know of the public records, there was at the time of the commission of the fraud at least *actual knowledge* that the property existed. In the present case, not only did intervener-appellant have no actual knowledge of the assignment records, but furthermore had no actual knowledge of the existence of the patent application made the subject of the assignment.

This difference clearly emphasizes why a duty may have existed in *Teall v. Schroder* and none existed in the present case.

Still further, it must be remembered that the decision in *Teall v. Schroder* protected three hundred and thirty-seven *innocent* defendants in possession.

Appellee, on page 25 of its brief, asserts that since Sears and Schrader terminated their employment with intervener-appellant in May of 1947, whatever confidential relationship, if any, existed ended at that time and with it the consequent legal implications arising therefrom. A quick answer to this misstatement of the law is that the legal implications arising from a confidential relationship necessarily survive the period of the relationship. See *Hobart v. Hobart Estate Co.*, 159 P. 2d 958, 26 Cal. 2d 412; *Anglo-California Nat. Bank of San Francisco v. Lazard* (C. C. A. 9), 106 F. 2d 693. Both of these cases were discussed in intervener-appellant's opening brief, pages 21, 22.

On page 25 of its brief appellee also asserts that Mr. Miketta as early as May, 1951 advised intervener-appellant of the issuance of the patent. This assertion has no

basis whatever in the finding although the appellee had prepared them. Accordingly, this Honorable Court should ignore these allegations.

### **Subheading "I."**

Under this subheading "I", appellee introduces an issue which was no part of the trial in the District Court and is not before this Court on review. This being an equity action, the trial in the court below was limited to the issues raised by the affirmative defense of laches. The defense of laches is, of course, a defense in the nature of a plea of confession and avoidance. For the purpose of this sole issue tried by the lower court, actionable fraud was necessarily presumed; the defense being that even assuming the existence of fraud that intervener-appellant's action was barred by laches.

The assertion that intervener-appellant does not contend that any misrepresentations were made by Schrader is meaningless. Schrader participated with Sears in the consummation of the fraud which intervener-appellant asserts was perpetrated upon it and shared in the benefits thereof.

### **Subheading "K."**

It is difficult to conceive a more relevant or material issue than that relating to the question as to whether intervener-appellant had either actual or constructive knowledge of the purported repudiation of Sears' and Schrader's obligation to assign inventions and the fraud which it alleges was perpetrated upon it. Mr. Miketta was the patent attorney for intervener-appellant and dealt with Sears and Schrader with regard to the matter of their assigning patent rights to intervener-appellant.



Under the circumstances Mr. Miketta would have been a conduit for both actual and constructive notice to intervenor-appellant. The failure of the trial court to make specific findings on Mr. Miketta does not eliminate this fact as very material and relevant fact issues in this case.

Mr. Miketta appeared as a witness on behalf of appellee and testified to certain rather nebulous and vague discussions purportedly had by him and representatives of intervenor-appellant relating to a purported arrangement wherein intervenor-appellant was to receive shoprights in lieu of a general assignment of inventions and patent rights which it was then demanding. The executives and representatives of intervenor-appellant with whom these conversations were supposed to have been had, emphatically denied any such conversations or that they had agreed or knew anything about this purported arrangement for shoprights in lieu of general patent assignments as testified to by Mr. Miketta.

Mr. Miketta testified as a witness in the case. We submit that counsel for intervenor-appellant have the right, and in fact it is their duty, to subject Mr. Miketta's testimony to the same analysis and criticism as they would the testimony of any other witness.

Appellee contends that on the date that Sears and Schrader consulted with Mr. Miketta (June 9, 1947), there was no conflict of interest between Sears and Schrader and intervenor-appellant, and that therefore Mr. Miketta was free to prepare and file the patent application as any strange patent counsel would be. This assertion is predicated upon the purported arrangement arrived at between Sears and Schrader in which intervenor-appellant

is supposed to have accepted shoprights in lieu of the general assignment of rights which they were demanding. But intervener-appellant emphatically denies that any such arrangement had been worked out or that they had in any way relinquished to Sears and Schrader the general inventions and patent rights that they were entitled to. Absent this purported relinquishment of inventions and patent rights by intervener-appellant could there be any doubt that on June 9, 1947 intervener-appellant was the owner of all inventions made by Sears and Schrader in the course of their employment?

We believe it is too well settled to require extensive argument that where an employee is assigned the duty of developing and construing machines and where such employee in the course of his employment, on his employer's time and at his employer's expense conceives and develops an invention, that invention is the property of the employer. See *Standard Parts Co. v. Peck*, 264 U. S. 52; California Labor Code, Sec. 2860.) Mr. Sears has freely admitted that the invention embodied in the patent in suit was conceived by him and Schrader while construing a swedging machine on their employer's time and at their employer's expense. [See Finding XIII, R. 47, 100.]

*Nowhere in the record, except for the purported arrangement testified to by Mr. Sears and Mr. Miketta, is there any evidence, documentary or otherwise to establish that intervener-appellant affirmatively relinquished any of its rights to Sears' and Schrader's inventions. We respectfully submit therefore that on June 9, 1947 when Mr. Miketta undertook to file an application for Letters Patent covering the invention involved in this case that*

he was dealing with property rights owned by intervener-appellant.

On page 32 of appellee's brief, appellee again distorts the statements made in intervener-appellant's brief on page 16. There is no concession of any sort that Mr. Miketta was under no obligation to disclose to intervener-appellant the fact that Sears and Schrader had filed the patent application. Under Mr. Miketta's circumstances, it was understandable why he would not do so, but this, of course, does not relieve him from any obligation.

### CONCLUSION.

Appellee's conclusion, we believe, unwittingly gives the explanation for the conduct of Sears and Schrader in appropriating intervener-appellant's invention and in the position which they have taken in this case. Appellee asserts that since the stockholders of intervener-appellant had entered into an agreement to sell all of the shares of the corporation to Eversharp, Inc., that therefore intervener-appellant had no real interest in the matter of preserving its patent rights. It should be recalled, first of all, that while there was a first option agreement executed in May of 1947, this agreement was superseded by the final option agreement which was not executed until *June 14, 1947*—nine (9) days after June 5th, on which date the so-called shopright instruments or contracts were executed purportedly in lieu of patent rights.

At the time that the negotiations between intervener-appellant and Sears and Schrader with respect to assignment of patent rights were in progress, culminating in what appellee purports to be the arrangement concluded on June 5, 1947, no final option agreement had been

executed between the stockholders of intervener-appellant and Eversharp, Inc. Furthermore, the agreement, when executed on June 14, 1947, was merely an option agreement. Intervener-appellant had no assurance whatever that this option would be exercised by Eversharp, Inc.; and as a matter of fact, as it turned out, it was never exercised and no final deal was consummated. While it may be true that the stockholders of intervener-appellant were anxious to facilitate the closing of the transaction with Eversharp, Inc.; it is absurd to assert that intervener-appellant, on the mere expectancy that its shareholder might dispose of their stockholding interests, would loosely fritter away potentially valuable patent rights in the manner contended for by appellee.

Appellee's conclusion points to the real explanation for Sears' and Schrader's conduct. Is it not reasonable to assume that Sears and Schrader, laboring under the impression that their former employer was in effect selling its business to a stranger and feeling that they owed no particular duty to the proposed new owner of that business, decided to assert claims with respect to their inventions made while in the employ of intervener-appellant which, in the absence of such sale, they would not have dared to assert against intervener-appellant, in the light of the circumstances under which these inventions were made?

May we again ask how, in the face of appellee's claim that Sears and Schrader were not obligated to assign inventions or patent rights, that in the shopright instrument executed by Schrader [Pltf. Ex. D, R. 181], Schrader actually does assign patent rights to a certain

invention conceived by him while in intervener-appellant's employ?

We again submit that the findings in this case are clearly erroneous for the reason that a consideration of "the entire evidence" must leave one with a definite and firm conviction that a mistake has been made by the trial court. We earnestly submit that the judgment should be reversed.

Respectfully submitted,

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